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# Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism

TODD E. PETTYS†

## INTRODUCTION

What a difference a year makes. Prior to 2010, most of the controversy surrounding judicial retention elections concerned their longstanding failure to attract the attention of the electorate. Critics complained that those elections were “issueless and lack-luster” affairs, incapable of drawing voters’ interest; they worried that the small handful of citizens who bothered to cast ballots relied “too heavily” upon the results of attorney-polls conducted by bar associations; and they argued that retention elections practically resulted in life tenure for those judges who did not have to endure any greater scrutiny in order to keep their jobs.<sup>1</sup> Writing in 2009, one scholar summed up the charge this way: “[R]etention elections are something of a fraud. They create a false veneer of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.”<sup>2</sup> Between

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1. Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 216-18 (1980); see also William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 342-43 (1987) (recounting comparable criticisms).

2. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 771 (2009) (footnote omitted); see also Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 811 (2004) (“[Retention] elections are organized to decrease the likelihood that members of the public will vote at all. . . . [R]etention elections seek to have the benefit of

1964 and 2006, for example, roughly one-third of those who voted in a given election year failed to fill out the portion of the ballot concerning judicial retention;<sup>3</sup> the mean affirmative vote in retention elections commonly remained comfortably above 70%;<sup>4</sup> and of the 6,306 judges who stood for retention during that time period, only fifty-six were defeated—and more than half of those who lost were in Illinois, where judges seeking retention must win at least 60% of the vote.<sup>5</sup>

The 2010 elections clearly signaled that, at least so far as states' high courts are concerned, the days of reliably quiet retention elections are over.<sup>6</sup> Voters in Iowa ousted three members of the Iowa Supreme Court in response to that court's 2009 ruling striking down Iowa's ban on same-sex marriage.<sup>7</sup> Organized anti-retention efforts fell shy of their mark in other states, but the number of those efforts was unprecedented.<sup>8</sup> A group called Alaska Family Action

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appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy." (footnote omitted)).

3. See Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 209 (2007).

4. See *id.*

5. See *id.* at 210; see also ILL. CONST. art. VI, § 12(d).

6. See generally Press Release, Brennan Center for Justice, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), <http://www.brennancenter.org/page/-/Democracy/release-november%202010-110310-final.pdf> ("Election Day 2010 brought a new round of special interest money, nasty ads and wedge issue politics into America's courtrooms, breaking several spending records and spreading costly, ideological hardball campaigns into new states. . . . But organized efforts to unseat high court justices failed in Illinois, Colorado, Alaska, Kansas and Florida.").

7. See A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/03/us/politics/03judges.html>; see also Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) ("[W]e hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution."). For a discussion of the retention battle in Iowa, see generally Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 KAN. L. REV. 715, 722-36 (2011).

8. See Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 118 (2011) ("[T]he 2010 judicial election cycle was unique: never before had so many states had organized opposition to a justice up for retention . . .").

Inc. narrowly failed in its bid to remove Justice Dana Fabe from the Alaska Supreme Court for her votes in cases dealing with abortion and other matters.<sup>9</sup> Members of Clear the Bench Colorado led an anti-retention campaign against three justices who sat on what these unhappy voters called the “most activist” state supreme court in the country.<sup>10</sup> A Tea Party-affiliated group called Citizen2Citizen led the fight to oust Justices Jorge Labarga and James Perry from the Florida Supreme Court for not allowing citizens to vote on a proposed constitutional amendment that would have barred the state from requiring individuals to buy health insurance.<sup>11</sup> The Illinois Civil Justice League cited concerns about tort damages and the treatment of criminal defendants in its bitter campaign to remove Chief Justice Thomas Kilbride from the Illinois Supreme Court.<sup>12</sup> The

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9. See Tracy Kalytiak, *Mailers Targets Justice Fabe*, MAT-SU VALLEY FRONTIERSMAN (Oct. 28, 2010, 9:49 PM), [http://www.frontiersman.com/articles/2010/10/29/local\\_news/doc4cca5393300d5949412875.txt](http://www.frontiersman.com/articles/2010/10/29/local_news/doc4cca5393300d5949412875.txt). Justice Fabe prevailed with a slim 53.2% majority. See Nov. 2 *Judicial Elections Roundup*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/conferences-and-events/nov-2-judicial-elections-roundup.aspx> (last updated Nov. 17, 2010).

10. See *Colorado's Supreme Court Is Still Out of Control*, CLEAR THE BENCH COLORADO, <http://www.clearthebenchcolorado.org> (last visited Nov. 12, 2011); see also Felisa Cardona, *Justices Face Stiff Retention Criticism*, DENV. POST, Oct. 3, 2010, at B6. One of the organization's primary complaints concerned the Colorado Supreme Court's role in increasing the tax burden for many citizens of Colorado. See *Colorado's Supreme Court Is Still Out of Control*, *supra*. The three justices were retained with affirmative votes ranging from 59% to 62%. See Nov. 2 *Judicial Elections Roundup*, *supra* note 9.

11. See William Gibson, *Tea Partiers Campaign Against Justices*, SUNSENTINEL.COM, (Sept. 21, 2010, 12:52 PM), [http://weblogs.sun-sentinel.com/news/politics/dcblog/2010/09/tea\\_partiers\\_campaign\\_against.html](http://weblogs.sun-sentinel.com/news/politics/dcblog/2010/09/tea_partiers_campaign_against.html). Justices Labarga and Perry were retained with affirmative votes of 58.9% and 61.7%, respectively. See Nov. 2 *Judicial Elections Roundup*, *supra* note 9. Justice Labarga's margin of victory was the lowest in the state's history. See Jane Musgrave, *Hostility to Judges a Dangerous Sign?*, PALM BEACH POST, Nov. 14, 2010, at 1A.

12. See David Kidwell, *In Group's Attack Ads, "Criminals" Bash Jurist; Backers of Jury-Award Caps Run Radio Spots Attempting to Oust High Court Judge*, CHI. TRIB., Oct. 22, 2010, at C1. The Illinois Civil Justice League's complaints about the treatment of criminal defendants were a little disingenuous—the League's primary concern was Chief Justice Kilbride's votes in cases dealing with tort damages, but they focused on criminal matters in an effort to stir up voters' passions. See Schotland, *supra* note 8, at 125. Chief Justice Kilbride was retained with an affirmative vote of 66%. See Nov. 2 *Judicial Elections Roundup*, *supra* note 9. That result is closer than it initially

anti-abortion group Kansans for Life launched what it dubbed the "Fire Beier" campaign to remove Justice Carol Beier from the Kansas Supreme Court for her votes on matters relating to abortion.<sup>13</sup>

With this surge in organized opposition to appellate judges who ruled in ways that some voters found objectionable, many fear that retention elections are now poised to take on "all the bruising characteristics of regular head-to-head judicial elections."<sup>14</sup> The worrisome trajectory that many judges and bar leaders are envisioning is easily summarized. For much of the nation's history, judicial elections of all kinds were usually "inexpensive, quiet, [and] uncompetitive."<sup>15</sup> In the 1970s, however, state courts began to assert themselves in a growing number of areas, including criminal law, privacy rights, school finance, torts,

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appears, given Illinois's requirement that judges seeking retention win at least 60% of the vote. See *supra* note 5 and accompanying text.

13. See Kathy Ostrowski, "Fire Beier" Campaign Attacks Justice's Abortion Bias, KANSANS FOR LIFE BLOG (Jan. 27, 2010), <http://kansansforlife.wordpress.com/2010/01/27/fire-beier-campaign-attacks-justices-abortion-bias/>. That campaign lost steam down the stretch. See Denis Boyles, *Kansas' 'Fire Beier' Campaign Disappears in a Cloud of Smoke*, NAT'L REV. ONLINE (Oct. 26, 2010), <http://www.nationalreview.com/corner/251019/kansas-fire-beier-campaign-disappears-cloud-smoke-denis-boyles> (lamenting the diminished profile of the campaign against Justice Beier during the weeks immediately preceding the election). Thirty-seven percent of those casting ballots nevertheless voted to remove Justice Beier from the bench. See *Nov. 2 Judicial Elections Roundup*, *supra* note 9.

14. John Gramlich, *Judges' Battles Signal a New Era for Retention Elections*, WASH. POST, Dec. 5, 2010, at A8 (stating that many "[l]egal experts" hold this view); see also Editorial, *Fair Courts in the Cross-Fire*, N.Y. TIMES, Sept. 29, 2010, at A30 ("[T]he lavish spending by interest groups and the politicization of state court judgeships is spreading from races between two or more judicial candidates to the 'retention' ballots that were supposed to shield judges from the rough-and-tumble of the election cycle.").

15. See Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 287 (2002). For a brief discussion of the historical origins of judicial elections, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 89-90 (1998). Judicial elections worldwide are quite rare, occurring outside of the United States only in Switzerland and Japan. See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232-33 (2008).

welfare, and zoning, among others.<sup>16</sup> Political parties, special-interest organizations, and repeat courtroom players gradually took notice.<sup>17</sup> In 1978, for example, deputy district attorneys in California provided a harbinger of things to come when they took the unusual step of recruiting candidates to run against judicial incumbents.<sup>18</sup> Over the next two decades, many people across the country concluded “that social, political, business, and environmental issues decided by elected state supreme court judges were too important to ignore,” and they directed their political energies accordingly.<sup>19</sup> Judges responded to the new electoral pressure by dramatically ramping up their fundraising efforts, thereby laying the groundwork for the perception, or reality, of judicial bias and conflicts of interest. Between 2000 and 2009, for example, individuals seeking seats on their states’ high courts collectively raised nearly \$210 million for their campaigns, far exceeding the sum raised in any prior decade.<sup>20</sup> As a result of these developments, judicial elections are now sometimes among

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16. See Carrington, *supra* note 15, at 99-103.

17. See *id.* at 105-06 (“In response to all this highly visible judicial behavior, many other political interest groups and parties began about 1980 to take a heightened interest in judicial elections.”).

18. See TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS, AM. BAR ASS’N, REPORT AND RECOMMENDATIONS: PART TWO 13-14 (1998) (stating that the moment when judicial elections started to heat up “can be dated with unusual precision,” and tracing that development to the 1978 elections in California).

19. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 367-68 (2002); see also Donald P. Judges, *Who Do They Think They Are?*, 64 ARK. L. REV. 119, 146-47 (2011) (stating that judicial elections have become increasingly political because of state courts’ involvement in recent decades in contentious areas of public policy, such as abortion, school finance, and tort reform).

20. See JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 1 (Charles Hall ed., 2010), available at [http://brennan.3cdn.net/d091dc911bd67ff73b\\_09m6yvpv.pdf](http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpv.pdf); see also *id.* at 78-85 (providing specific spending figures from numerous states). The turning point in these fundraising efforts occurred during the 2000 elections, when candidates for seats on state supreme courts raised nearly \$50 million for their campaigns, 61% more than state supreme court candidates had raised during the prior election cycle. Brandenburg & Schotland, *supra* note 15, at 1237; see also *id.* at 1235 (“[A]lthough high court elections began boiling over in 2000 with more competition, more funding and more intensity, this was preceded by more than a decade of simmering political and special interest pressure.”).

the most costly and hard-fought head-to-head matchups on voters' ballots.

The inventors and early champions of judicial retention elections hoped to spare state judiciaries from precisely that kind of intense politicization. Nearly a century ago, Albert Kales—a law professor at Northwestern University and co-founder of the American Judicature Society—launched a movement aimed at persuading states to abandon the practice of filling court vacancies with judicial elections.<sup>21</sup> He urged states to establish nonpartisan bodies for the task of nominating slates of qualified individuals to fill those vacancies, with a lone decision-maker then appointing new judges from the short lists that those nonpartisan bodies prepared.<sup>22</sup> He believed that his “merit-selection” plan would curb the perceived evils associated with judges who had to depend upon courting powerful people and winning elections in order to obtain their seats on the bench.<sup>23</sup> Recognizing that including some sort of opportunity for voter input would be essential to make the merit-selection plan politically saleable among early-twentieth-century Progressives, Kales and other advocates reluctantly added judicial retention elections to the mix, whereby appointed judges would appear on voters' ballots, unopposed, after a short initial term of service and again periodically thereafter.<sup>24</sup> But these reformers emphatically hoped that

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21. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 608-09 (2009).

22. Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 169-70 (2007). Under Kales's original plan, a council of sitting judges would prepare the slates and a state's chief justice would be the one ultimately responsible for choosing new judges from the council's lists. See Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61, 66-67 (1968). Subsequent reformers proposed that the slates be prepared by judicial nominating commissions and that a state's governor be the one charged with making the final selections. See *id.* at 67-70. Kales's plan, thus amended, generally held that shape going forward, leaving individual states to tinker with the details in various ways. See *id.* at 70-74.

23. See Tarr, *supra* note 21, at 607-08.

24. Carbon, *supra* note 1, at 215; see also Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 853-57 (2002); Carbon, *supra* note 1, at 220-21, 233; Hall & Aspin, *supra* note 1, at 340-42; Tarr, *supra* note 21, at 607-09.

retention elections would be uneventful and quiet, with voters rising up to oust judges only in rare cases of egregious misconduct.<sup>25</sup>

Numerous state lawmakers found those proposals persuasive. Today, roughly half of the nation's states use some version of a merit-selection process to appoint at least some of their judges, and most of those states ask their appointed judges to stand in periodic retention elections, as well.<sup>26</sup> In the other half of the nation's states, contested elections remain the primary means by which judicial vacancies are filled in the first instance.<sup>27</sup> In a few of those states, the winners of those contested elections then periodically must stand unopposed in retention elections in order to retain their seats.<sup>28</sup>

The 2010 elections demonstrate that judges in retention-election states can no longer rest comfortably on

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25. See Carrington, *supra* note 15, at 97. Indeed, many champions of the merit-selection process hoped that states might eventually abandon judicial retention elections altogether. See Tarr, *supra* note 21, at 609.

26. See *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, <http://www.judicialselection.us> (follow "Selection of Judges" hyperlink) (last visited Nov. 12, 2011) (indicating that twenty-four states use some version of merit-selection, and that of those states, sixteen hold retention elections); see also Bierman, *supra* note 24, at 857-59 (providing a brief overview of the different types of merit-selection systems currently in place). The American Bar Association threw its weight behind the merit-selection and retention-election concepts in 1937, Missouri became the first state to adopt that package of reforms for some of its judges in 1940, and numerous other states followed suit in the decades that followed. Caufield, *supra* note 22, at 170-71. In more recent years, the move to merit-selection systems has lost some of its steam, as citizens have become increasingly aware of the power that judges wield and have concluded that "political power would be transferred from themselves to those who do the merit selecting." Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002).

27. See *Methods of Judicial Selection*, *supra* note 26 (indicating that twenty-two states select their judges through contested elections). A small number of states rely on other mechanisms to fill judicial vacancies, such as legislative elections or legislative confirmation of gubernatorial appointments. See *id.* (indicating that four states—Maine, New Jersey, South Carolina, and Virginia—use one of these alternate methods).

28. See *id.* (explaining that in Illinois, New Mexico, and Pennsylvania, judicial vacancies are filled through partisan elections, but the winners of those contests subsequently retain their seats on the bench if they prevail in uncontested retention elections).



the assumption that voters will routinely exempt them from meaningful scrutiny.<sup>29</sup> For those who believe that heavily politicized judicial elections are a threat to state courts' integrity and independence—and such individuals certainly predominate in the circles in which state judges, bar leaders, and legal academics commonly run<sup>30</sup>—this is troubling news indeed. Just like judges who must win and hold their seats in head-to-head matchups in other states, judges who formally stand unopposed in retention elections must now think seriously about launching ambitious fundraising campaigns, and they must wrestle more strenuously with the temptation to decide cases in ways that will play well on Election Day.

In this Article, I do not take issue with the claim that these are distressing developments.<sup>31</sup> I do, however, push back against the common wisdom in legal circles by arguing that the leading rhetorical strategies of those who seek to defend judges against anti-retention campaigns are fundamentally misguided.

As I explain in Part I, targeted judges and their defenders typically try to deflect voters' attention from the

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29. See *supra* notes 6-13 and accompanying text (noting anti-retention efforts in numerous states).

30. One scholar writes:

Many legal academics and the majority of the judiciary itself view judicial selection by election as inimical to values of judicial independence. The elected-judge paradigm has been criticized repeatedly in the popular media, through bar association publications, and in law reviews. Defenders argue the system is as good as or better than any other, but this is a decidedly minority view among anyone with a law degree.

Meryl J. Chertoff, *Trends in Judicial Selection in the States*, 42 MCGEORGE L. REV. 47, 47 (2010) (footnote omitted); see also *id.* at 57-59 (noting the widespread hope in such circles that more states will abandon contested judicial elections and will move instead to a merit-selection and retention-election system); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009) ("For many academics, elite lawyers, and federal judges, it is an assumed truth that judges should be protected completely from public influence.").

31. The story of judicial elections is not, however, as one-sided as the critics of such elections might have one believe. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2068-86 (2010) (identifying potentially desirable attributes of high-profile judicial elections).

merits of any particular rulings that have drawn voters' ire.<sup>32</sup> Rather than defend targeted judges' reasoning in controversial cases, pro-retention forces typically advance a set of case-transcending deontological and consequentialist arguments. When describing pro-retention arguments as deontological, I mean simply to denote arguments that do not draw their strength from claims about consequences.<sup>33</sup> (A deontological argument against murder might posit, for example, that murder inherently violates the victim's autonomy and dignity, while a consequentialist argument might posit that murder robs society of the contributions that the victim might otherwise have made.) Deontological arguments in favor of judges' retention rely upon the claim that ousting judges in response to their controversial rulings is intrinsically inconsistent with the rule of law and reflects a failure to understand the work that we rely upon judges to do.<sup>34</sup> Consequentialist pro-retention arguments contend that, if voters oust a judge because they find some of his or her rulings objectionable, then a variety of undesirable consequences will follow—other judges, for example, will frustrate the rule of law by letting the fear of political consequences influence their reasoning, or will feel compelled to develop conflict-producing relationships with powerful donors.<sup>35</sup>

I argue in Part II that the deontological arguments usually lack merit. Setting consequentialist concerns aside, voting to oust a judge because one finds some of his or her rulings objectionable is perfectly consistent with a commitment to the rule of law, except in the rare circumstances that I describe. With respect to the consequentialist arguments, I argue in Part III that, even if those arguments are analytically meritorious, stubborn psychological forces render them rhetorically ineffectual

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32. See *infra* Part I.A.

33. Cf. CHARLES FRIED, *RIGHT AND WRONG* 8-9 (1978) (contrasting deontology and consequentialism in the realm of morality); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 1-3 (rev. ed. 1994) (same); Robert G. Olson, *Deontological Ethics*, in 2 *THE ENCYCLOPEDIA OF PHILOSOPHY* 343, 343 (Paul Edwards ed., 1967) ("A deontological theory of ethics is one which holds that at least some acts are morally obligatory regardless of their consequences for human weal or woe.").

34. See *infra* Part I.B.

35. See *infra* Part I.C.

when raised in response to a spirited anti-retention campaign launched by morally outraged voters. I conclude that if we are troubled by the direction in which the 2010 elections point, then either we should abandon judicial retention elections altogether and limit appointed state judges to single terms, or those judges and their defenders should set aside their historic reluctance to engage citizens in civil discourse about controversial rulings and their legal and moral underpinnings.

### I. DEFENDING TARGETED JUDGES: RHETORICAL STRATEGIES

Looking back on the 2010 elections and on the handful of prior occasions when controversial rulings provoked angry voters and special-interest groups to launch organized anti-retention campaigns, a pattern has plainly emerged. While targeted judges' critics focus relentlessly on the rulings to which they object, the judges and their supporters generally refuse to engage in a debate about the merits of those rulings. Instead, judges and their advocates rely primarily upon a set of deontological and consequentialist arguments aimed at securing judicial independence.

#### A. *The Aversion to Debating Controversial Cases' Merits*

Prior to 2002, candidates in judicial elections of all kinds were professionally obliged in most states to avoid talking publicly about certain kinds of controversial issues. Canon 7B of the American Bar Association's ("ABA's") 1972 Model Code of Judicial Conduct stated that a candidate for judicial office "should not . . . announce his views on disputed legal or political issues . . ."<sup>36</sup> Most states adopted some version of that text over the ensuing decade and a half.<sup>37</sup> Critics (including a number of courts) concluded, however, that Canon 7B unconstitutionally restricted

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36. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972). The 1972 Model Code was not the ABA's first attempt to persuade states to regulate judges and judicial candidates in particular ways. See *Republican Party of Minn. v. White* (*White I*), 536 U.S. 765, 786 (2002) ("The first code regulating judicial conduct was adopted by the ABA in 1924.").

37. Adam R. Long, Note, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 796 (2001).

candidates' freedom to speak.<sup>38</sup> In 1990, the ABA responded by narrowing the scope of the restriction, stating that judicial candidates "shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ."<sup>39</sup> A number of states adopted the 1990 text, while others retained the older version.<sup>40</sup> To varying degrees, candidates in all of those states were thus obliged to steer clear of discussing many controversial issues when campaigning to win or retain seats on the bench. Candidates built their campaigns instead on claims about their qualifications and their overarching commitment to fairness, honesty, impartiality, and other relevant values.<sup>41</sup>

In its 2002 ruling in *Republican Party of Minnesota v. White* (*White I*),<sup>42</sup> the United States Supreme Court cast new light on judicial candidates' freedom to speak during election campaigns. At issue in that case was a provision of the Minnesota Code of Judicial Conduct that had been

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38. See *id.* at 796-97 (noting that numerous state and federal courts held that Canon 7B was unconstitutionally vague and overbroad); see, e.g., *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228-29 (7th Cir. 1993) (finding the rule grossly overinclusive); *ACLU of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990) (holding that the Florida Bar had failed to show that the rule was "the least restrictive means for protecting a compelling state interest"). See generally U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

39. MODEL CODE OF JUDICIAL CONDUCT § 5A(3)(d)(ii) (1990). Although stylistically different, that provision remains substantively unchanged in the 2007 Model Code. See MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007) ("[A] judicial candidate shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.").

40. See Long, *supra* note 37, at 797. Four states (Idaho, Michigan, North Carolina, and Oregon) declined to adopt either version of the relevant speech restriction, while one state (Alabama) narrowly limited the restriction to issues raised in pending litigation. See *White I*, 536 U.S. 765, 786 & nn.13-14 (2002).

41. See Abbe & Herrnson, *supra* note 15, at 291-92, 295 (presenting the results of a statistical study of judicial candidates' campaign messages).

42. 536 U.S. 765 (2002). On remand, the United States Court of Appeals for the Eighth Circuit also struck down the "partisan activities and solicitation clauses" of the Minnesota Code of Judicial Conduct. *Republican Party of Minn. v. White* (*White II*), 416 F.3d 738, 766 (8th Cir. 2005).

modeled on Canon 7B of the 1972 Model Code.<sup>43</sup> Applying strict scrutiny,<sup>44</sup> the Court accepted for the sake of argument that Minnesota had a compelling interest in seating judges who were “open-minded”—judges, that is, who were “willing to consider views that oppose [their] preconceptions, and remain open to persuasion, when the issues arise in a pending case.”<sup>45</sup> But the Court rejected the proposition that Minnesota’s lawmakers had that objective in mind when they restricted judicial candidates’ ability to speak about controversial legal and political issues.<sup>46</sup> As proof that seating open-minded judges was not the state’s actual objective, the Court said that the restriction was “woefully underinclusive”—the state had made no effort to bar people from running for judicial office if they had stated their views on controversial matters prior to launching their campaigns, and it had made no effort to restrict judges from stating their views after they had been elected (so long as no pertinent case was pending before them).<sup>47</sup>

Having thus declared the provision unconstitutional,<sup>48</sup> the Court concluded by observing that there was an “obvious tension” between Minnesota’s longstanding commitment to filling judicial vacancies with contested elections and its attempt to bar judicial candidates from talking about “most subjects of interest to the voters.”<sup>49</sup> The Court stated:

[T]he First Amendment does not permit [the state] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. “The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it

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43. *White I*, 537 U.S. at 768. Minnesota was still relying upon the 1972 version of the Model Code. *Id.*; see also Shepherd, *supra* note 30, at 644-45 (noting that, by 2002, only nine states retained the 1972 version of Canon 7B).

44. *White I*, 536 U.S. at 774-75 (noting that the parties and the court below all agreed that strict scrutiny was appropriate).

45. *Id.* at 778.

46. *Id.* at 779.

47. See *id.* at 779-81.

48. *Id.* at 788 (announcing the Court’s holding).

49. *Id.* at 787.

must accord the participants in that process . . . the First Amendment rights that attach to their roles.”<sup>50</sup>

While acknowledging that judicial candidates’ freedom to speak is not necessarily as broad as the freedom enjoyed by candidates seeking seats in states’ legislative bodies,<sup>51</sup> the Court said that the differences between judicial and legislative elections should not be exaggerated.<sup>52</sup> State judges do “make” law, the Court reasoned—both by shaping the common law and by wielding “the immense power to shape the States’ constitutions”—and so the core First Amendment values that are in play in legislative elections are in play in judicial elections, as well.<sup>53</sup>

When critics attack sitting judges’ records during election campaigns, *Republican Party of Minnesota v. White* thus gives those judges a powerful First Amendment argument that they are free to speak in defense of their controversial rulings. Indeed, setting aside the unconstitutional restrictions that 1972’s Canon 7B had imposed, the successive iterations of the ABA’s Model Code have made it increasingly clear that sitting judges possess precisely that freedom. With respect to retention elections in particular, for example, the 1972 Model Code stated that “[a]n incumbent judge who is a candidate for retention . . . and whose candidacy has drawn active opposition, may campaign in response thereto . . . .”<sup>54</sup> The 1990 Model Code put an even finer point on the matter, stating that a

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50. *Id.* at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

51. *See id.* at 783 (“[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”).

52. *Id.* at 784.

53. *Id.* Writing for four dissenters, Justice Ginsburg took a different view:

Judges . . . are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . .

Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public’s ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.

*Id.* at 806 (Ginsburg, J., dissenting).

54. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(3) (1972).

candidate in any kind of judicial election “may respond to personal attacks or attacks on the candidate’s record,”<sup>55</sup> so long as he or she is truthful and does not make any statements that are inconsistent with his or her duty to be impartial in future cases.<sup>56</sup> The drafters of the 2007 Model Code elaborated on the point still further in their official comments, explaining that a judicial candidate’s opponents might make “false or misleading statements . . . regarding the . . . judicial rulings of a candidate,” and that in such a case, “the candidate may make a factually accurate public response.”<sup>57</sup>

Despite those constitutional and professional freedoms, a culture nevertheless still widely prevails in which judicial candidates feel they should avoid talking in detail about their controversial rulings. That culture is surely the product of numerous influences. When a judge has already explained her reasoning in a written opinion, for example, she might feel reluctant to say anything further on the matter, fearing that she would create confusion if her remarks were construed as adding a new gloss to her written account.<sup>58</sup> Moreover, in merit-selection and retention-election states in particular, judges and bar leaders have staked themselves firmly to the virtues of judicial independence.<sup>59</sup> For these leaders, engaging in a merits-based defense of controversial rulings might seem implicitly to concede that one’s agreement or disagreement with those rulings should play a role in determining how one should vote when the judges who wrote or joined those rulings stand for retention. In some instances, judges’ reluctance to defend their controversial decisions is likely a

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55. MODEL CODE OF JUDICIAL CONDUCT § 5(A)(3)(e) (1990).

56. *Id.* § 5(A)(3)(d).

57. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 8 (2007).

58. I am grateful to Justice Linda Neuman, formerly of the Iowa Supreme Court, for sharing this observation with me.

59. See *infra* notes 107-16, 123-31 and accompanying text (noting the ABA’s strong endorsement of the virtues of judicial independence); see also MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007) (“A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”); MODEL CODE OF JUDICIAL CONDUCT § 5(A)(3)(a) (1990) (“A candidate for a judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary . . .”).

function of their desire not to risk saying anything that might be construed as unethical.<sup>60</sup> In other instances, judges' reticence might be a function of skepticism about laypeople's ability to understand complex legal matters.<sup>61</sup> Whatever the reasons, judges who have angered voters typically run pro-retention campaigns that largely ignore their controversial rulings and that focus instead on the themes of judicial independence, fairness, and impartiality.

Consider, for example, the 2010 elections in Iowa, when Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker all faced opposition for joining the Iowa Supreme Court's unanimous ruling in *Varnum v. Brien*, holding that Iowa's ban on same-sex marriage violated the Iowa Constitution.<sup>62</sup> While the justices' critics focused

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60. See JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 11.09, at 11-28 (4th ed. 2007) (stating that the general thrust of many ethics rulings across the country "is that anything that could be interpreted as a pledge that the candidate will take a particular approach in deciding cases or a particular class of cases is prohibited"). Some enforcement authorities have taken aggressive positions against permitting judicial candidates to explain their past decisions. In the early 1980s, for example, the Alabama Judicial Inquiry Commission took the position that a sitting judge campaigning to keep his seat "should refrain from commenting on specific cases in which he has participated, especially where such comment could compromise the validity of any ruling or order entered by him in such cases." Ala. Judicial Inquiry Comm'n Op. 82-156 (1982), available at <http://www.alalinc.net/jic/opinions/ao82-140thru157.HTM>; see also Ala. Judicial Inquiry Comm'n Op. 80-85 (1980), available at <http://www.alalinc.net/jic/opinions/ao80-85&86.HTM> (same); ALFINI, *supra*, § 11.09, at 11-31 (discussing the decisions of the Alabama Judicial Inquiry Commission). In instances in which there is no risk that an explanation would "compromise the validity" of past rulings or orders, this anti-speech position is not dictated by the express language of the 1972, 1990, or 2007 Model Codes, see *supra* notes 54-57 and accompanying text, and it plainly is in tension with judicial candidates' First Amendment freedoms under *Republican Party of Minnesota v. White*. See *supra* notes 42-53 and accompanying text.

61. See *infra* notes 292-94 and accompanying text (discussing such skepticism).

62. 763 N.W.2d 862, 872 (2009) ("[W]e hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution."); see also IOWA CONST. art. I, § 6 ("All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."); IOWA CODE § 595.2(1) (2009) ("Only a marriage between a male and a female is valid."), *superseded by Varnum*, 763 N.W.2d at 907. For a discussion of the campaign against the three justices, see Pettys, *supra* note 7, at 722-36.



relentlessly on the issue of same-sex marriage—accusing the justices of being “activist[s]” whose “radical” ruling “imposed gay marriage” on an unwilling public<sup>63</sup>—the justices and their leading defenders said hardly a word about *Varnum*. Indeed, the three justices themselves generally refused to say anything at all on their own behalf.<sup>64</sup> The organized groups that emerged to defend them focused almost entirely on the theme of judicial independence, arguing that Iowans should not use retention elections as an opportunity to oust judges in response to controversial rulings. True to its name, for example, Iowans for Fair and Impartial Courts focused on its core message that “Iowa’s merit selection and retention process are [sic] key to maintaining [Iowa’s] fair and impartial courts.”<sup>65</sup> A nonpartisan coalition called Justice, Not Politics similarly argued that “Iowa’s merit selection and retention process keeps politics and campaign money out of our courts, safeguarding its fairness and impartiality.”<sup>66</sup> Fair Courts for Us urged Iowans to keep the state’s judiciary “independent,” “fair,” and “non-partisan” by voting to retain the justices.<sup>67</sup> None of these organizations presented a detailed defense of *Varnum*. On the issue of same-sex marriage and its status

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63. Nation for Marriage, *NOM: Iowans for Freedom Against Radical Judges*: David A. Baker, Michael J. Streit, Marsha Ternus, YouTube (Oct. 19, 2010), [http://www.youtube.com/watch?v=MIFnBBLX\\_OE](http://www.youtube.com/watch?v=MIFnBBLX_OE) (television advertisement sponsored by Iowa for Freedom, the National Organization for Marriage, and the Campaign for Working Families).

64. Chief Justice Ternus broke the three justices’ near-silence just a few days before the election, and even then she focused on the dangers of using a “retention election as a referendum on a particular court decision,” rather than on defending *Varnum* itself. Matt Milner, *Targeted Chief Justice Speaks Out*, OTTUMWA COURIER, Oct. 26, 2010, <http://ottumwacourier.com/local/x1872731036/Targeted-chief-justice-speaks-out> (noting Chief Justice Ternus’s public remarks approximately one week before the election and reporting that “Ternus and the other justices have said they will not engage in a campaign to retain their seats and they are not raising money to fund such a campaign”).

65. See IOWANS FOR FAIR & IMPARTIAL COURTS, <http://www.learniowa.courts.org> (last visited Nov. 12, 2011).

66. *About*, JUSTICENOTPOLITICS.ORG, <http://www.justicenotpolitics.org/about> (last visited Nov. 12, 2011); see also *Coalition Opposes Politicizing Judiciary*, DES MOINES REG., Sept. 28, 2010, at 2B (identifying preserving Iowa’s merit-selection process as the goal of Justice, Not Politics).

67. Pettys, *supra* note 7, at 731 & n.102 (citing webpage that is no longer available).

under the Iowa Constitution, the justices and their leading defenders left the court's written opinion in *Varnum* to fend for itself.

One could see the same difference in focal points in individual Iowans' letters to their local newspapers. One study found that while more than 85% of the anti-retention letter-writers condemned *Varnum* in one manner or another, approximately 75% of the pro-retention letter-writers declined to defend *Varnum* at all, choosing instead to urge retention on other grounds.<sup>68</sup> Taken as a whole, the pro-retention camp implicitly told voters that they ought to choose the lesser of two evils: it is better to retain justices who occasionally rule in ways we find objectionable than to oust justices for those occasional objectionable rulings. Indeed, a radio advertisement sponsored by Fair Courts for Us conveyed that message explicitly, comparing the three justices to good referees who had forgivably made one "questionable call."<sup>69</sup>

The 2010 elections followed a similar pattern in other states. In Alaska,<sup>70</sup> for example, Justice Fabe's supporters focused on her proclaimed commitment to "fair and impartial justice."<sup>71</sup> In Florida,<sup>72</sup> the supporters of Justices Labarga and Perry argued that the anti-retention campaign was a threat to Florida's "independent judiciary" and "a gross abuse of the merit-retention process, which . . . [was] never intended to be a political referendum based on a

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68. See Tyler J. Buller, *Framing the Debate: Understanding Iowa's 2010 Judicial Retention Election Through a Content Analysis of Letters to the Editor*, 97 IOWA L. REV. (forthcoming July 2012) (manuscript at 19-21), available at <http://ssrn.com/abstract=1793313>.

69. See Grant Schulte, *Pro-Retention Ad: Vote 'Yes, Yes, and Yes' to the Justices*, DESMOINESREGISTER.COM (Oct. 15, 2010), <http://blogs.desmoinesregister.com/dmr/index.php/2010/10/15/> (containing both the audio and the text of the advertisement).

70. See *supra* note 9 and accompanying text (noting the 2010 campaign against Justice Fabe).

71. Alaskans for Justice Dana Fabe, FACEBOOK, <http://www.facebook.com/pages/Alaskans-for-Justice-Dana-Fabe/159399637424701> (last visited June 20, 2011) (webpage no longer available).

72. See *supra* note 11 and accompanying text (noting the 2010 campaign against Justices Labarga and Perry).

single opinion.”<sup>73</sup> In Kansas,<sup>74</sup> Justice Beier’s supporters decried the “unprecedented attack on the independence of the Kansas judicial system” and urged voters to remain “committed to a fair and impartial judiciary.”<sup>75</sup>

This campaign strategy traces its roots back many years. Consider, for example, the 1986 elections in California, when (as in Iowa in 2010) three justices on a single state supreme court were ousted in one fell swoop.<sup>76</sup> When they went to the ballot box that year, California voters removed Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph Grodin from the California Supreme Court for repeatedly voting to overturn death sentences.<sup>77</sup> Anti-retention forces ran a heated campaign against the three justices, accusing them of favoring killers

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73. Anthony Man, *Republicans, Tea Party Trying to Oust Supreme Court Justice from Palm Beach County*, SUNSENTINEL.COM (Oct. 29, 2010, 8:55 AM), [http://weblogs.sunsentinel.com/news/politics/palm/blog/2010/10/republicans\\_tea\\_party\\_trying\\_t.html](http://weblogs.sunsentinel.com/news/politics/palm/blog/2010/10/republicans_tea_party_trying_t.html) (quoting a statement issued by a group called Floridians for an Independent Judiciary).

74. See *supra* note 13 and accompanying text (noting the 2010 campaign against Justice Beier).

75. Mission, JUSTICE FOR KANSAS, INC., <http://www.justiceforkansasinc.com/about-2> (last visited Nov. 12, 2011); see also Roxana Hegeman, *Kansas Voters Keep Justices*, TOPEKA CAP.-J., Nov. 3, 2010, at 2A (“Kansas for Life’s [anti-retention campaign against Justice Beier] had prompted a group of lawyers calling themselves Justice for Kansas to launch a counter-campaign to assure the ‘independence of the judiciary.’”).

76. See Schotland, *supra* note 8, at 118.

77. See Frank Clifford, *Voters Repudiate 3 of Court’s Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at A1 (reporting the ouster of the three justices and stating that Chief Justice Bird had voted to overturn all of the sixty-one death sentences that came before her for review, that Justice Reynoso had voted to overturn forty-six of the forty-seven death sentences that came before him for review, and that Justice Grodin had voted to overturn forty of the forty-five death sentences that came before him for review). Most of the anti-retention activity was focused on Chief Justice Bird. Justices Reynoso and Grodin were then swept up in the tide. See *id.*; see also Lorie Hearn, *Grodin Blames Link to Bird for Ouster*, SAN DIEGO UNION-TRIB., Nov. 13, 1986, at A3. Chief Justice Bird was unpopular for additional reasons. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2022-32 (1988) (stating that Chief Justice Bird was “secretive and withdrawn,” that she often seemed uncomfortable in social situations, and that she seemed to plainly favor the Democratic Party in her decisions).

over victims and their families.<sup>78</sup> Rather than specifically defend their rulings in those and other cases, the targeted justices built their campaign primarily on the theme of judicial independence—the one theme that “polling indicated . . . would *not* work.”<sup>79</sup> To the extent that the justices and their champions *did* defend the court’s controversial rulings, they suggested that the law in those cases had mechanically forced the justices to reach their conclusions, thereby denying what many voters intuitively knew to be true—namely, that ideology and judgment do play roles in the work that judges perform.<sup>80</sup>

That same general pattern has been repeated in other states. In 1996, for example, unhappy voters targeted Justice Penny White, of the Tennessee Supreme Court.<sup>81</sup> Her critics charged that she was unfit to remain in office because she had voted to vacate a convicted killer’s death sentence in *State v. Odom*,<sup>82</sup> a case involving the rape and murder of an elderly woman.<sup>83</sup> Conservative groups and victims’ rights organizations launched an anti-retention campaign, arguing that Justice White was “pro-criminal” and “anti-death penalty.”<sup>84</sup> Due to the likelihood that the

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78. See Robert Lindsey, *Defeated Justice Fearful of Attacks on Judiciary*, N.Y. TIMES, Nov. 8, 1986, at A7 (“[M]ost of the most widely broadcast anti-Bird commercials were emotional appeals by parents and other [relatives] of murder victims whose killers had escaped execution . . . .”); Thompson, *supra* note 77, at 2039 (“[I]n a constantly repeated series of television spots, many times spotlighting relatives of murder victims, [the anti-retention campaign] graphically depicted the circumstances of the crime, concluding with the statement that the death penalty imposed upon the defendant had been reversed.”); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 348 (1987) (reproducing the text and images of a few anti-retention advertisements).

79. Wold & Culver, *supra* note 78, at 350.

80. See Thompson, *supra* note 77, at 2038-39. For a discussion of popular perceptions of the adjudicative process, see *infra* notes 100-02 and accompanying text.

81. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70 (1999) (describing the origins of the anti-retention campaign against Justice White).

82. 928 S.W.2d 18 (Tenn. 1996).

83. *Id.* at 21-22; see Reid, *supra* note 81, at 70.

84. Reid, *supra* note 81, at 70.

*Odom* case would return to the Tennessee Supreme Court on a subsequent appeal, Justice White (quite understandably) refused to discuss the controversial ruling during her campaign.<sup>85</sup> Instead, she argued as a general matter that she was not “soft” on crime, tried to discredit some of the groups leading the charge to oust her, and stressed the “ideal of judicial independence.”<sup>86</sup> Ultimately, Justice White lost her bid to remain on the court, receiving only 45% of the vote.<sup>87</sup>

The same year that voters ousted Justice White from her seat on the Tennessee Supreme Court, voters in Nebraska removed Justice David Lanhier from that state’s high court.<sup>88</sup> Justice Lanhier’s critics accused him of disregarding the will of ordinary Nebraskans by joining a ruling striking down a state constitutional amendment that had imposed term limits on state and federal officers, and by joining a series of rulings narrowing the scope of the state’s definition of second-degree murder.<sup>89</sup> Explaining that he wanted “to maintain the dignity of the office,” Justice Lanhier refused to campaign on his own behalf or to defend his past rulings, other than to point out during last-minute press interviews that the state’s prison population had increased during his time in office.<sup>90</sup> Instead, he relied on Nebraska voters to embrace the virtues of judicial independence.<sup>91</sup> On Election Day, ballots cast by his opponents outnumbered those of his supporters by roughly a two-to-one margin.<sup>92</sup>

The point should not be overstated—targeted justices do sometimes defend their records, albeit at a fairly high level of abstraction. In the 2010 elections in Illinois,<sup>93</sup> for

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85. *Id.* at 71, 73-74.

86. *Id.* at 72.

87. *See id.* at 71-72.

88. *Id.* at 68.

89. *Id.* at 70.

90. *Id.* at 72.

91. *See id.*

92. *See* Leslie Boellstorff, *Lanhier Loses Seat on Supreme Court*, OMAHA WORLD-HERALD, Nov. 6, 1996, at A1.

93. *See supra* note 12 and accompanying text (noting the 2010 campaign against Chief Justice Kilbride).

example, Chief Justice Kilbride ran television advertisements trumpeting his toughness on crime.<sup>94</sup> Yet refusing to defend controversial rulings remains the widely prevailing norm.

The oft-repeated argument for judicial independence entails a number of sub-arguments, some of which are deontological in nature and some of which are consequentialist. I briefly recount those arguments here before proceeding in Parts II and III to critique them.

### B. *Deontological Arguments*

When put in colloquial terms, deontological<sup>95</sup> pro-retention arguments can be reduced to the proposition that, wholly apart from concerns about consequences, judges should not be fired for simply doing their jobs. When one votes to oust a judge because one finds some of his or her rulings objectionable, the argument here goes, one manifests a failure to understand the rule of law and the accompanying distinction between law and politics. A citizen who understands these precepts will recognize, on this view, that retention elections are a categorically inappropriate forum for expressing one's policy preferences or one's personal views about how the law should be interpreted and applied in individual cases. Although he focused primarily on consequentialist concerns, Charles Geyh appeared to advance this line of argument in his article, *Why Judicial Elections Stink*: "[T]he premise underlying campaigns to defeat judges who make rulings with which voters disagree—namely, that judges are supposed to make decisions agreeable to their 'constituents'—contributes to the [mistaken] view that the judiciary is as 'political' a branch of government as the other two . . . ."<sup>96</sup>

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94. See, e.g., FairCourtsPage, *Justice Thomas Kilbride Defends Himself From Attack Ads*, YOUTUBE (Oct. 21, 2010), <http://www.youtube.com/watch?v=DonT0iTG4mE>; FairCourtsPage, *Justice Thomas Kilbride Tough on Crime (Illinois 2010)*, YOUTUBE (Oct. 8, 2010), <http://www.youtube.com/watch?v=eTOUgFXgqS8&NR=1>.

95. See *supra* note 33 and accompanying text (defining the term "deontological").

96. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 51-52 (2003).

Many others have made comparable claims. During the 2010 elections in Iowa, for example, roughly a third of citizens who wrote letters to their local newspapers in defense of the three targeted justices argued that judges are obliged to interpret the state constitution without regard to the interpretation's political popularity, and that the members of the Iowa Supreme Court thus were simply doing their jobs when they struck down the state's ban on same-sex marriage.<sup>97</sup> One letter-writer put it this way:

The court interpreted law, within the parameters of our state's Constitution. And in so doing, [it] unanimously stated that the law restricting marriage to a man and a woman was unconstitutional.

...

The Iowa Supreme Court was doing its job, interpreting law even when it may be unpopular.

Let's keep all seven of them on the bench.<sup>98</sup>

Another writer similarly argued:

The retention concept is a protection from those judges who might be incompetent, who might fail to give due diligence in reviewing cases, who might be proven to have received bribes to influence a vote. The concept was not intended as a reprimand for failure to interpret the constitution as demanded by any religious ideology or business interest. A vote against retention of a specific person based on self-interest or on individual belief is a vote against the judicial system.<sup>99</sup>

In drawing a connection between disregard for the law-politics distinction and opposition to judges who have participated in controversial rulings, deontological arguments might be construed in either of two ways. They sometimes might be construed as claiming that the targeted

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97. See Buller, *supra* note 68, manuscript at 20-21.

98. Rob Potts, Letter to the Editor, *Justices Did Not "Make Law;" They Interpreted It*, OTTUMWA COURIER ONLINE (Oct. 22, 2010), <http://ottumwacourier.com/letters/x693285242/Justices-did-not-make-law-they-interpreted-it>.

99. Alan L. Egly, Letter to the Editor, *Don't Vote Against Judge Based on Self-Interest, Ideology*, QUAD-CITIES ONLINE (Oct. 27, 2010), <http://www.qconline.com/archives/qco/display.php?id=516205>.

judges were mechanically applying the objective dictates of the law when they ruled as they did in controversial cases, such that it is senseless to blame the judges themselves for those cases' outcomes. Some Americans do hold the view that the law typically provides objectively correct answers to which all reasonable judges are ineluctably drawn,<sup>100</sup> and prominent jurists do sometimes speak of adjudication as if it involved nothing more than the objective application of determinate rules.<sup>101</sup> Many Americans recognize, however, that adjudication frequently demands the exercise of judicial discretion because legal texts and principles are often less than fully determinate.<sup>102</sup>

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100. See James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 207 (2011) (finding that some Americans believe in "mechanical jurisprudence," but that this belief is not particularly widespread); John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000) ("The myth of legality holds that cases are decided by the application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning. . . . [T]he myth of legality is deeply ingrained in American culture.").

101. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role."); Geyh, *supra* note 96, at 72 ("[O]ur state and national governments . . . depend[] on [their] courts to ensure that the executive and legislative branches and the temporary majorities they represent conform their conduct to the *dictates* of the Constitution . . . ." (emphasis added)). See generally Jack Ladinsky & Allan Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 168 ("The traditional, conservative, and elitist interpretation of judicial power, stressing its majesty, aloofness, and neutrality, developed, we suspect, as a reactive defense against a population more 'populist' and interventionist in the past than it is now."); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1710 (2007) ("[T]he [umpire] metaphor has become accepted as a kind of shorthand for judicial 'best practices' . . . ."); Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 132-43 (2011) (discussing the prevalence of formalistic rhetoric during Supreme Court confirmation hearings).

102. See Carrington & Long, *supra* note 26, at 469 ("Although there was a time . . . when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political



For many of those who take this latter view, judges remain importantly distinct from members of the state and federal governments' political branches by virtue of the perception that judges exercise their discretion "in a principled, rather than strategic, way."<sup>103</sup> That is, when making their discretionary decisions, judges limit themselves to a narrower set of reasons than is available in the realm of ordinary electoral politics—they base their decisions only upon "reasons provided by the law, and not on reasons excluded by judicial duty or the law's standards."<sup>104</sup> Judges "are not merely politicians in robes,"<sup>105</sup> therefore, but rather are constrained (yet discretion-exercising) stewards of the law. In their more sophisticated forms, deontological pro-retention arguments thus may be understood as positing that the rule of law in America necessarily entails relying upon judges to make principled discretionary decisions on legal matters about which reasonable judges might disagree, and that citizens thus fail to understand the rule of law when they contend that mere

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consequences, there is virtually no one who thinks that today." (footnote omitted)); Gibson & Caldeira, *supra* note 100, at 207-08 (making a comparable point using empirical analysis); *see also infra* Part II.A (elaborating on this point). *See generally* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 179 (4th ed. 2006) (noting Legal Realists' rejection nearly a century ago of the mechanical notion that legal conclusions "followed simply and inexorably from undeniable premises").

103. Gibson & Calderia, *supra* note 100, at 213. Another marker of the law-politics distinction on this view is judges' obligation to explain their decisions in ways that are not expected of politicians. *See* Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481, 485 (2010/2011) ("[T]he most important judicial constraint is the requirement of explanation—the practice of courts to write out reasons for their judgments."); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 156 (2005) ("[T]he judiciary's legitimacy and authority depend largely on its ability to persuasively explain and justify its decisions."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) ("One of the few ways we [judges] have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do."). For elaboration upon the law-politics distinction, *see* Pettys, *supra* note 101, at 169-72.

104. Pettys, *supra* note 101, at 170 (quoting STEVEN J. BURTON, JUDGING IN GOOD FAITH 92 (1992)).

105. Gibson & Caldeira, *supra* note 100, at 214.

disagreement with judges' rulings is an adequate reason to remove those judges from office.<sup>106</sup>

### C. Consequentialist Arguments

Concerns about the rule of law also loom large in the cluster of consequentialist arguments that pro-retention forces advance when judges are targeted for ouster in response to controversial rulings. Numerous prominent jurists have warned that using retention elections as an opportunity to express disapproval of judges' decisions poses dire threats to states' judicial systems. In 1998, for example, the ABA's Task Force on Lawyers' Political Contributions declared: "Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case."<sup>107</sup> The ABA's Commission on the Twenty-First

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106. This appears, for example, to be Michael Shapiro's argument. Shapiro readily acknowledges "the difficulties in clearly distinguishing judging from politics." Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1559 (1988). He nevertheless opposes judicial elections as a general matter:

The promotion of the democratic value in judicial elections challenges the rule of law value in a particularly vivid and therefore dangerous way. To say that something is a matter for popular election—where by design there is no way to assure the use of rational decision criteria—is to suggest that it is not a matter governed primarily by binding principles. To say that public officials of certain kinds should be elected suggests that what they do is not dominated by principled decisionmaking. To say that judges should be elected or subject to retention elections after appointment suggests that what they do is similar in many respects to what legislators and executives do, and that they may be chosen on the same bases.

Even if the ideal of the rule of law is overrated, it doesn't deserve this injury.

*Id.* at 1562-63 (footnote omitted).

107. TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, *supra* note 18, at 6; accord Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008) ("[T]he primary threat to [judicial] independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."); see also *id.* at 1259 ("It is thought that if judges are independent—if they are insulated from political and other controls that could undermine their impartial judgment—they will be better able to uphold

Century Judiciary issued a comparable warning in 2003, arguing that when judges are targeted for ouster in response to their rulings on specific issues, it sends a “message [that] is antithetical to principles of judicial independence, impartiality, and the rule of law.”<sup>108</sup> Chief Justice Paul De Muniz of the Oregon Supreme Court has written that “[n]othing can be more damaging to a society based on the rule of law than if judges fear that they will be removed from office or that their livelihood will be impacted solely for making a decision that is right legally and factually but unpopular politically.”<sup>109</sup>

Proponents of consequentialist arguments contend that there are several ways in which the rule of law is threatened when voters deny retention to judges who have written or joined controversial rulings.<sup>110</sup> First, Election Day ousters send other judges the message that they need to engage in significant—and problematic—fundraising if they want to maximize their ability to fend off any challenges that might materialize in their own retention bids further down the road. To build campaign war chests, judges must develop relationships with donors—relationships that, in turn, create the reality or perception of bias and conflicts of interest when those judges adjudicate cases that bear upon their contributors’ concerns.<sup>111</sup> Empirical research

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the rule of law, preserve the separation of powers, and promote due process of law.”).

108. COMM’N ON THE 21ST CENTURY JUDICIARY, AM. BAR ASS’N, JUSTICE IN JEOPARDY 67 (2003) [hereinafter JUSTICE IN JEOPARDY].

109. De Muniz, *supra* note 19, at 389.

110. Some consequentialist arguments concern matters other than the rule of law. Some critics of anti-retention campaigns worry, for example, that heightened fears about one’s job security on the bench will discourage good people from pursuing judgeships. See, e.g., Schotland, *supra* note 8, at 127-28.

111. See STANDING COMM. ON JUDICIAL INDEP., AM. BAR ASS’N, REPORT OF THE COMM’N ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 1, 4 (2002) (stating that the need to raise money for judicial elections sits in tension with judges’ obligation to uphold the rule of law by applying the law impartially, without regard to their rulings’ popularity or affect on powerful people); Ming W. Chin, *Judicial Independence: Under Attack Again?*, 61 HASTINGS L.J. 1345, 1348 (2010) (“When judges have to rely on campaign donors to get or keep their jobs, there is an inevitable public perception of judicial bias and favoritism. This perception threatens to diminish the courts’ effectiveness . . . .”); Lawrence M. Friedman, *Benchmarks: Judges on Trial, Judicial Selection and Election*, 58 DEPAUL L. REV. 451, 460 (2009) (“A regime of hotly contested, feverish judicial

demonstrates that campaign contributions have the same perceived power to corrupt when directed to judges as when they are directed to politicians.<sup>112</sup> Indeed, the perception of corruption is especially pernicious for judges, whose impartiality is an indispensable component of any system that purports to honor the rule of law.<sup>113</sup>

Second, when voters demonstrate their willingness to deny retention to judges who have participated in controversial rulings, they increase the risk that judges will decide cases based upon anticipated electoral consequences rather than upon what the judges believe is the thrust of the law.<sup>114</sup> Lawrence Friedman makes this point when he argues that “[a] regime of hotly contested, feverish judicial elections is dangerous . . . [because of the risk] that judges, facing or fearing opposition, will shy away from decisions that might make trouble at the polls.”<sup>115</sup> A significant body

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elections . . . [forces] judges . . . to campaign, but campaigning costs money and money corrupts.”); Reid, *supra* note 81, at 77 (“[T]he integrity of the courts and public confidence in them are threatened by the mere perception that judicial decisions might be influenced by interest group politics and campaign contributions.”).

112. See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 69 (2008) (reporting, based on empirical research, that campaign contributions powerfully undermine the perceived impartiality and legitimacy of judicial candidates and politicians alike).

113. See *infra* Part II.B.3.b (discussing the rule of law).

114. See JUSTICE IN JEOPARDY, *supra* note 108, at 72 (observing that, when an election is looming, judges may feel great pressure to do what is popular). See generally *Republican Party of Minn. v. White* (*White I*), 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) (“[I]n litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.”); De Muniz, *supra* note 19, at 388 (“Outcome-determinative criticism [of judges] is corrosive to judicial independence because it implies that a judge should always reach a particular outcome regardless of the law.”); Reid, *supra* note 81, at 77 (“The legitimacy of courts and judges [in the public’s eye] is directly tied to ensuring that judicial decisions reflect an objective application of the law, not whether a court ruling will be supported or opposed by a particular group or individual.”).

115. Friedman, *supra* note 111, at 460. The posited link between insulation from electoral consequences and sound judicial decision-making is not, however, undisputed. See, e.g., MICHAEL NEUMANN, *THE RULE OF LAW: POLITICIZING ETHICS* 11 (2002) (“Perhaps [a politically insulated] judiciary is so arrogant in its independence, or so complacent, or of such poor quality, that a little dependence would actually improve the quality of its judgments.”).

of empirical evidence suggests that judges facing upcoming elections are indeed sometimes influenced by worries about the political ramifications of their rulings.<sup>116</sup>

Third, ousting judges for controversial rulings about *constitutional* matters threatens the project of constitutionalism itself. Constitutionalism demands that judges decide cases based upon the sovereign people's long-term constitutional commitments, even when those commitments conflict with the electorate's short-term majoritarian preferences—and the threat of non-retention makes it harder for judges to disregard those short-term preferences.<sup>117</sup> Many state and federal constitutional texts are aimed at providing protection for political minorities, yet those texts provide little protection if judges are unwilling to issue unpopular constitutional rulings.<sup>118</sup> Alexander Hamilton expressed precisely this concern in *The Federalist No. 78* when defending the plan to insulate federal judges from electoral influences:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the

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116. See Judges, *supra* note 19, at 135-36 (citing numerous studies to support the assertion that appointed and elected judges behave differently); Eric Sandberg-Zakian, *Rethinking "Bias": Judicial Elections and the Due Process Clause After Caperton v. A.T. Massey Coal Co.*, 64 ARK. L. REV. 179, 199-201 (2011) (citing empirical studies showing that judicial decisions are sometimes made with the hope of being reelected).

117. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696-97 (1995) ("[T]o the extent majoritarian pressures influence judicial decisions because of judges' electoral calculations, elective judiciaries seem, at least at first glance, irreconcilable with one of the fundamental principles underlying constitutionalism.").

118. See Pozen, *supra* note 31, at 2087 ("Choosing judges through elections, it is often said, poses serious threats to individual and minority rights . . ."); see also *id.* at 2100 ("[T]he specter of lawlessness, of barely concealed favoritism and presentist populism run amok, looms large over the new era of judicial elections.").

government, and serious oppressions of the minor party in the community.<sup>119</sup>

As a matter of political marketing, these consequentialist arguments have been grouped for many years under the banner of “judicial independence.”<sup>120</sup> Yet there has been a perceptible shift in recent years to supplement (or even replace) that phrase with the terms “fair” and “impartial.”<sup>121</sup> The problem with the phrase “judicial independence” has been that, for voters who are already angered by particular rulings, a plea to preserve judges’ independence risks fueling the perception that judges see themselves as elites who are entitled to supplant the will of the people with their own conception of the public good. Traci Reid illustrates this point in her discussion of Justice White’s and Justice Lanphier’s failed 1996 bids for retention in Tennessee and Nebraska, respectively:

[B]oth White and Lanphier had to argue in favor of “the ideal of judicial independence.” Hinging their retention upon the public acceptance of the value of judicial independence reinforced the underlying premise of their opponents’ argument. The anti-retention forces contended that justices such as White and Lanphier were too independent because their decisions were antithetical to or out-of-step with popular sentiments. When proponents of White and Lanphier commendably tried to discuss the importance of an independent judiciary, they unwittingly were bolstering the concerns and criticisms of their opponents.<sup>122</sup>

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119. THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

120. See, e.g., Reid, *supra* note 81, at 72.

121. See, e.g., *supra* notes 65-75 and accompanying text (noting the prevalent use of the terms “fair” and “impartial” during the 2010 elections).

122. Reid, *supra* note 81, at 72; see also *supra* notes 81-92 and accompanying text (noting those two failed bids for retention). Dave Pimentel recently made the same general observation:

[T]he term “judicial independence” does not always strike the desired chord. While that phrase resonates within the legal community as something desirable . . . it may seem less desirable in other circles . . .

. . . .

. . . [T]o the general public at least, and even to legislators at times, the words “judicial independence” may smack of the judges’ self-interest—shoring up judges’ power or enhancing their comfort by insulating them from any consequences for their actions. For those who already view

By shifting to the terms “fair” and “impartial,” judges and their champions hope to avoid that trap and to denote more precisely the societal goods that judicial independence is meant to achieve.

Consider, for example, the work of the ABA’s Least Understood Branch Project (“the Project”)—a joint endeavor of the ABA’s Standing Committee on Judicial Independence and the ABA’s Judicial Division, with the participation of the League of Women Voters, Justice at Stake, and the National Center for State Courts.<sup>123</sup> On the ABA’s website, the Project has provided what it calls a “Resource Kit on Fair and Impartial Courts.”<sup>124</sup> Visitors to that site can find a variety of resources for judges and their defenders to use when judges are targeted for ouster in response to controversial rulings.<sup>125</sup> The Project has written sample letters to the editor, sample resolutions for state and local governments, advice for campaign speeches, and other materials—and the words “fair” and “impartial” permeate those texts.<sup>126</sup> In a guide titled *In Support of Fair and Impartial Courts: Countering the Critics*,<sup>127</sup> for example, consultants retained by the Project recount the story of a judge who spoke to a group of local voters about “the importance of judicial independence” and was hammered at the end of his talk by “a battery of complaints and comments about the courts and judges: their inefficiency, lack of accountability and mishandling of various hot-button

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judges as over-privileged and too powerful, such “judicial independence” would be at best a low priority, and more likely a problem in need of a remedy.

Dave Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 6-7 (2009).

123. See *Resource Kit on Fair and Impartial Courts*, AM. BAR ASS’N, [http://www.americanbar.org/groups/justice\\_center/judicial\\_independence/resources/resource\\_kit\\_on\\_fair\\_impartial\\_courts\\_lub.html](http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resource_kit_on_fair_impartial_courts_lub.html) (last visited Nov. 12, 2011) (describing the Least Understood Branch Project).

124. See *id.*

125. See *id.* (providing links to numerous materials).

126. See *id.*

127. MARGIE ELSBERG, AM. BAR ASS’N, *IN SUPPORT OF FAIR AND IMPARTIAL COURTS: COUNTERING THE CRITICS* (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/judind/toolkit/impartialcourts/critics.authcheckdam.pdf> (last visited June 25, 2011).

issues.”<sup>128</sup> The Project’s consultants then provide approximately twenty pages of advice aimed at helping speakers engender support for courts that are “as Fair and Impartial as is humanly possible.”<sup>129</sup> When a questioner wants to argue about a controversial ruling, for example, the consultants urge the speaker to refuse to enter the debate and to use the exchange instead as an opportunity to return to the themes of fairness and impartiality.<sup>130</sup> The consultants advise speakers to repeat those two words and themes as often as is reasonably possible:

Repetition is a powerful tool so use it—your audience will remember the words “fair and impartial courts” if you say them over and over. At the same time, you’ll want to avoid sounding like a broken record. So from time to time, you might turn to sports analogies for help.

- *“If we all want ballgames to be impartially refereed—when all that’s at stake is a banner in the gym or a plaque on the wall—think how important it is to this democracy that our court proceedings be fair and impartial.”*
- *“Just as referees must follow the rules of the game, judges are held accountable to the Constitution and the Bill of Rights—not to politicians and special interests. Don’t forget that court decisions must be published for all to see. And if someone feels the decision wasn’t fair, they can appeal it to a higher court.”<sup>131</sup>*

When invoked to assuage the concerns of angry voters, these rhetorical strategies—deontological and consequentialist alike—are fundamentally misguided. I address the deontological arguments in Part II and the consequentialist arguments in Part III.

## II. DEONTOLOGY AND THE RULE OF LAW

Deontological pro-retention arguments posit that, wholly apart from anticipated consequences, a citizen who understands the rule of law and the distinction between law and politics will recognize that one’s vote in judicial retention elections does not provide an appropriate vehicle

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128. *Id.* at 3.

129. *Id.*; see also *id.* at 4-19 (providing advice).

130. See *id.* at 7.

131. *Id.*



for declaring one's views about public policy or one's disagreement with particular judicial rulings.<sup>132</sup> I noted earlier that such arguments might be construed in either of two ways. First, one might understand them as claiming that targeted judges were mechanically applying the objective dictates of the law when they ruled as they did in controversial cases.<sup>133</sup> Second, one might understand these arguments as claiming that the rule of law necessarily entails relying upon judges to make principled discretionary decisions on matters about which reasonable judges might disagree.<sup>134</sup> I begin by briefly elaborating on the reasons why arguments of the former variety should generally be shunned. Turning then to the latter, more nuanced form of argument, I contend that—consequentialist concerns aside—voting to oust judges who have participated in controversial rulings is often entirely consistent with a commitment to the rule of law.

A. *The Mechanical Interpretation of the Deontological Argument*

As I have noted, judges and other prominent members of the legal establishment frequently use rhetoric suggesting that the job of a judge is quite mechanical—it is to ascertain the relevant facts (perhaps with the aid of a jury), and then to identify the outcome that is objectively dictated by the law's determinate sources.<sup>135</sup> We saw this most famously in Chief Justice John Roberts' use of the umpire metaphor during his confirmation hearings,<sup>136</sup> we frequently see it when political leaders praise or condemn particular judicial nominees and judicial rulings,<sup>137</sup> and we see it when someone tries to resolve a hotly contested public policy issue (such as abortion or same-sex marriage) by

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132. See *supra* Part I.B; see also *supra* note 33 (defining "deontological").

133. See *supra* notes 100-01 and accompanying text.

134. See *supra* notes 102-06 and accompanying text.

135. See *supra* notes 100-01 and accompanying text.

136. See *supra* note 101. See generally Gibson & Caldeira, *supra* note 100, at 196-97 (noting that judicial nominees routinely—and disingenuously—deny that they will exercise significant discretion).

137. See Pettys, *supra* note 101, at 126, 132-43 (discussing remarks made by senators during Supreme Court confirmation hearings).

appealing to the “dictates” of the Constitution.<sup>138</sup> Such language has long been part of our public dialogue and judicial mythology.<sup>139</sup> When deployed in conjunction with a deontological argument against ousting state judges, this mechanical view of courts’ work suggests that, when voters oppose a judge’s bid for retention because he or she participated in controversial rulings, those voters fail to understand that the law gave the judge no choice but to rule in the way that he or she did. When voters oppose judges who participated in controversial rulings, in other words, they are foolishly setting themselves in opposition to the law itself.

In those areas of the law where one finds sustained public controversy and where anti-retention campaigns are thus most likely to find traction, deontological arguments of this sort are almost always false. There are, of course, instances in which judges do little more than apply the plain requirements of the law, as when a case calls for the application of unambiguous thresholds (like ages and speed limits) or when a dispute plainly falls within a well-developed line of uncontested and homogeneous precedent.<sup>140</sup> These are not the kinds of cases, however, that typically provoke voters to oppose judges’ bids for retention. As the 2010 elections make clear, the rulings that provoke anti-retention campaigns tend to concern matters like abortion, same-sex marriage, and the rights of criminal defendants—matters governed by legal texts whose open-

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138. See *supra* note 101 and accompanying text.

139. See, e.g., THE FEDERALIST NO. 78, *supra* note 119, at 464 (arguing that the judiciary is the “least dangerous” branch because it possesses “neither FORCE nor WILL but merely judgment”); see also Paul J. Mishkin, *The Supreme Court. 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62-63 (1965) (“[There] is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply the law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. . . . If the view be in part myth, it is a myth by which we live . . .” (footnote omitted)). For a discussion of the social purposes that such mythologies serve in the constitutional realm, see Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1029-48 (2009).

140. Cf. RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996) (“[M]ost constitutional cases . . . are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction.”).

ended wording is reasonably susceptible to competing interpretations.<sup>141</sup> When the relevant legal texts speak at a high level of abstraction, or when the identification of the relevant legal texts is itself contested, judges must—by necessity—exercise interpretive discretion.<sup>142</sup> This does not mean that judges are free to select any outcomes and rationales that suit their fancy. Rather, it means that in cases of the sort that are likely to trigger public controversy, there often are multiple ways “in which a judge who conscientiously applies the interpretive conventions of the legal profession could resolve the given dispute.”<sup>143</sup>

Within the legal profession, the claim that judges frequently exercise interpretive discretion is hardly controversial.<sup>144</sup> Focusing on constitutional disputes in particular, James Bradley Thayer observed more than a century ago that “much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; [and] that there is often a range of choice and judgment.”<sup>145</sup> Judge Richard Posner has made the same point about the law more generally:

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141. See *supra* notes 6-13 and accompanying text.

142. The existence of a large body of precedent does not necessarily reduce or eliminate the need for interpretive discretion. See Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1205 (2005) (concluding, based on empirical analysis, “that judicial discretion appears to expand with the growth of additional precedents,” presumably because larger bodies of precedent have more analytic strains from which to choose).

143. Pettys, *supra* note 101, at 124 & n.3 (defining “discretion” in this way and citing supporting authorities); see also Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, in *THE RULE OF LAW* 178, 189 (Ian Shapiro ed., 1994) (“Discretion is the power to choose between two or more courses of action each of which is thought of as lawful.”).

144. Cf. Gibson & Caldeira, *supra* note 100, at 196 (“[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges. In this sense, legal realism has carried the day.”).

145. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); see also *id.* at 148 (stating that judges’ job is to “fix[] the outside border” of interpretive choices that elected officials can make).

There is almost always a zone of reasonableness within which a decision either way can be defended persuasively, or at least plausibly, using the resources of judicial rhetoric. But the zone can be narrow or wide—narrow when formalist analysis provides a satisfactory solution, wide when it does not. Within the zone, a decision cannot be labeled “right” or “wrong”; truth just is not in the picture.<sup>146</sup>

One of the chief functions of legal education is thus to train students to develop “a feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted,”<sup>147</sup> recognizing that those outer bounds will shift over time and often will be reasonably contestable at any given moment in history.<sup>148</sup>

Widespread recognition of judges’ interpretive discretion—and of the mechanical model’s corresponding inaccuracy—is manifested in many ways. Consider, for example, the Antiterrorism and Effective Death Penalty Act of 1996.<sup>149</sup> In that legislation, Congress dramatically altered the federal habeas landscape by directing federal judges to deny habeas relief to any state prisoner whose claims have

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146. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1053 (2006); see also *id.* at 1065-66 (elaborating on the factors that cause the zone of reasonableness to appear wide or narrow to particular judges in individual cases).

147. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 100 (1990); see also *id.* (“The most important thing that law school imparts to its students is . . . an awareness of approximately how plastic law is at the frontiers—neither infinitely plastic . . . nor rigid and predetermined, as many laypersons think—and of the permissible ‘moves’ in arguing for, or against, a change in the law.”).

148. Jack Balkin explains:

No transhistorical set of criteria defines what is on the wall and what is off the wall in legal argument. At any point in time, some arguments are clearly frivolous, but the class of such arguments keeps changing, and it changes in part through the very activity of making arguments that skirt the boundaries of the implausible and off the wall.

Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 568 (2003); cf. John B. Judis, *Neutralized: Can American Democracy Survive the Demise of Impartial Institutions?*, NEW REPUBLIC, Apr. 28, 2011, at 16, 18 (“Discerning where disinterested readings of the law morph into political activism—on both the left and the right—is a difficult and highly imperfect business.”).

149. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

already been adjudicated in state court proceedings, unless that prior adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .”<sup>150</sup> When presented with a claim that a state court has already adjudicated, therefore, a federal judge in a habeas case must do much more than merely determine whether he or she believes the state court’s conclusion was “correct” in the sense that it is the same conclusion the federal judge would have reached.<sup>151</sup> Rather, even if the federal judge disagrees with the state court’s conclusion, he or she must deny habeas relief if the state court’s application of Supreme Court precedent fell within (to borrow Judge Posner’s phrase) the “zone of reasonableness.”<sup>152</sup> The Court has explained that the breadth of that zone in a given case depends heavily upon the nature of the legal rule or standard being applied:

If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.<sup>153</sup>

The mechanical model’s inaccuracy also frequently reveals itself in the context of judicial selection. When the President nominates individuals for seats on the United States Supreme Court or another prominent federal bench,

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150. 28 U.S.C. § 2254(d)(1) (2006).

151. See *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (“For purposes of today’s opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”).

152. See *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011) (“As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”); see also *supra* note 146 and accompanying text (quoting Judge Posner).

153. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

the nominations typically draw scrutiny and controversy, both of which would be far less likely to emerge if the law's requirements always were clear. As political scientists Chris Bonneau and Melinda Gann Hall recently observed, "[t]he fact that politicians, organized interests, the media, and the public all are concerned about seats on the United States Supreme Court is *prima facie* evidence that judging is not the neutral, impartial enterprise some would have us believe."<sup>154</sup> When a judicial nomination does provoke controversy, the nominee's proponents might argue that the nominee will simply apply the law like a neutral umpire, but such claims are unlikely to appease the nominee's opponents—those claims simply do not accord with what we know about the work that judges do. If we are wise to shun the mechanical model in the setting of federal judicial nominations, there is no reason to pay it any greater regard when state judges stand for retention.

B. *The Discretion-Based Interpretation of the Deontological Argument*

More sophisticated deontological arguments embrace the fact that judges often must make discretionary interpretive judgments within a zone of reasonableness when deciding controversial cases.<sup>155</sup> The rule of law necessarily entails relying upon judges to make such judgments, the argument here runs, and citizens thus fail to respect the rule of law when they seek to oust judges merely for issuing rulings with which those citizens disagree. There are occasions when that argument is sound, but those occasions are far less frequent than one might initially suppose.

As a means of critiquing this form of argument, let us imagine that a judge—we will call her Judge Jones—has adjudicated a case involving abortion, same-sex marriage, or some other persistently controversial matter. Drawing from the prior subsection's discussion, let us further posit that there was a zone of reasonableness in that case, such that other judges applying the interpretive conventions of

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154. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 138 (2009).

155. For a discussion of the "zone of reasonableness," see *supra* notes 140-48 and accompanying text.

the legal profession might have decided the case differently.<sup>156</sup> Judge Jones is now standing for retention and a group of angry voters has coalesced to oppose her. With respect to the ruling that has drawn the angry voters' attention, Judge Jones and her opponents will find themselves in one of three different situations: either (1) Judge Jones's ruling falls outside the zone of reasonableness (that is, it falls outside the scope of permissible judicial discretion); (2) Judge Jones's ruling falls within the zone of reasonableness, but the angry voters' preferred ruling does not; or (3) Judge Jones's ruling and the angry voters' preferred ruling both fall within the zone of reasonableness. Judge Jones and her opponents almost certainly will disagree about which of those scenarios best describes their situation. That disagreement is not significant for my purposes here, however, because my aim is simply to show how infrequently the discretion-based deontological argument is meritorious. To analyze the various possibilities, I thus simply assume that we know which of the three scenarios applies in a given instance. I take up each of them in turn.

1. *Scenario One: The Wayward Judge.* If Judge Jones's ruling falls outside the zone of reasonableness, there is no deontological basis on which to argue that voters who hope to oust her on Election Day fail to appreciate the rule of law or the distinction between law and politics. To the contrary, it is *Judge Jones* who appears not to understand or value those fundamental precepts, and thus there is a deontological argument in favor of removing her from the bench. After all, she has strayed to the wrong side of the law-politics divide by issuing a ruling that cannot be justified within the universe of reasons that are properly available to a judge. This is the claim that one hears most frequently in anti-retention campaigns—that the targeted judge is an “activist” who has behaved like a politician rather than a member of the state bench, and that the judge's removal is thus necessary to help restore the rule of law.<sup>157</sup> In Colorado, for example, the organization behind that state's 2010 anti-retention campaign has declared that one of its ongoing objectives is to “[e]ducate Colorado voters

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156. See *supra* notes 141-54 and accompanying text.

157. See *supra* notes 7-13 and accompanying text (noting such anti-retention arguments).

on the importance of judges observing principles of the 'rule of law' in deciding cases."<sup>158</sup>

Of course, Judge Jones's defenders might argue that she has otherwise been a good judge and that her issuance of one wayward ruling is not an appropriate reason to terminate her service to the state.<sup>159</sup> This is the same argument that Fair Courts for Us made in 2010 when it compared the Iowa Supreme Court's ruling on same-sex marriage to a football referee's "questionable call," and told voters that "you shouldn't fire the good referees over just one call."<sup>160</sup> If the claim here is that all judges make mistakes and that it is unfair to end Judge Jones's judicial career based on just one ruling, the argument will lack credibility if Judge Jones refuses to concede that her controversial ruling was indeed erroneous and thus refuses to give voters any assurance that she will not make the same mistake again—and Judge Jones surely will not offer any such concession or assurance. If the argument is instead that the state is unlikely to find a replacement who will make fewer "questionable calls" than Judge Jones, the argument will fail to persuade those who have particularly strong feelings about the subject matter of Judge Jones's controversial ruling, and it will suffer from the same weaknesses that afflict all consequentialist arguments, as I will discuss in Part III. In any event, if one looks at the matter solely through a deontological lens, and if Judge Jones has indeed exceeded the scope of permissible judicial discretion, then concerns about the rule of law weigh *against* her retention, rather than for it.

2. *Scenario Two: The Wayward Voter.* If Judge Jones's ruling in the controversial case instead falls within the zone of reasonableness, but the angry voters' preferred ruling does not, then we have located a scenario in which there is a sound deontological argument in favor of Judge Jones's retention. When voters insist that Judge Jones should have

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158. See *About CTBC, CLEAR THE BENCH COLORADO*, <http://www.clearthebenchcolorado.org/about/> (last visited Nov. 12, 2011).

159. Depending on its proponents' intended meaning, this argument could be either deontological or consequentialist in nature. For a discussion of the consequentialist side of the argument, see *infra* Part III.

160. See Schulte, *supra* note 69 (providing a citation for the audio and text of Fair Courts for Us' advertisement).



ruled in a way that the interpretive conventions of the legal profession would not have allowed, they manifest a failure to appreciate the rule of law and the distinction between law and politics. Of course, making this argument persuasively in an electoral setting is extraordinarily hard. As Professor Geyh has observed, "[i]t is one thing to expect voters with no training in the law to decide whether the policies favored by senators and governors . . . coincide with their own positions, and quite another to expect them to decide whether the rulings of judges coincide with the law."<sup>161</sup> Not only must Judge Jones convince angry voters that her ruling falls within the range of legally permissible outcomes, but she also must convince those voters that the law is not sufficiently flexible to accommodate the outcome that they would have preferred.

This is hardly the stuff of sound bites and thirty-second television ads. Indeed, even members of the legal profession often cannot agree on where the proper bounds of interpretive discretion should be drawn,<sup>162</sup> and so convincing lay citizens that their preferred outcome was not legally available to Judge Jones is no easy matter. Moreover—and most importantly for our purposes here—this line of argument is not commonly available, because the legal texts that govern many controversial issues (like abortion, same-sex marriage, and the death penalty) are written at a high level of abstraction and are at least plausibly susceptible to the competing interpretations that large segments of the citizenry persistently give them. Public-policy debates in these areas remain hotly contested year after year in part *because* the relevant legal texts do not decisively foreclose widely held sets of answers. In the cases that typically spark the anger of significant numbers of voters, one simply cannot ordinarily say that no reasonable judge could have reached the conclusion that the angry voters preferred. But in the rare instance in which all reasonable judges would agree that the law did indeed preclude angry voters' preferred outcome, there is an analytically (even if perhaps not politically) meritorious argument in favor of the targeted judges' retention.

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161. Geyh, *supra* note 96, at 59.

162. See *supra* notes 144-53 and accompanying text.

3. *Scenario Three: Battles Within the Realm of Reasonable Disagreement.* If Judge Jones's ruling and the angry voters' preferred ruling *both* fall within the range of conventionally permissible outcomes—and the indeterminacy of the legal texts that govern many hotly contested issues is such that Judge Jones and her opponents are likely to find themselves in this scenario—then we are presented with a circumstance that demands more patient analysis. There certainly are consequentialist defenses that Judge Jones might raise (arguing, for example, that the systemic costs of politicizing retention elections outweigh the benefits of removing judges who sometimes occupy a portion of the zone of reasonableness that one does not favor),<sup>163</sup> but those arguments encounter their own set of obstacles, as I will discuss in Part III. Is there any *deontological* reason why citizens' commitment to the rule of law should compel them to refrain from ousting a judge whose rulings sometimes occupy one segment of the zone of reasonableness rather than another? In 2010, for example, many moderates and liberals claimed injury to the rule of law when conservative Iowa voters removed three of the Iowa Supreme Court's seven justices from office.<sup>164</sup> If a justice akin to Antonin Scalia or Clarence Thomas had been on the Iowa ballot instead, should those same moderates and liberals have felt that their commitment to the rule of law obliged them to vote in favor of retention?

Consequentialist concerns aside, voting to oust judges because they occupy a politically disfavored portion of the zone of reasonableness is entirely consistent with a commitment to the rule of law. To understand why that is so, we must briefly say more about citizens' sovereign prerogatives and about the rule of law itself.

a. *Citizens' Sovereign Prerogatives.* Stepping back from the retention-election context for a moment, it is a fundamental principle of American constitutionalism that, if a government official will wield the power to make law, then it is a prerogative of the sovereign people to specify the

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163. See *supra* Part I.C (describing consequentialist pro-retention arguments).

164. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to the Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

process by which that government official will be chosen.<sup>165</sup> That principle holds true just as much for judges (who shape the law through their discretionary interpretive judgments)<sup>166</sup> as it does for executives and legislators. Although reasonable people can disagree as a policy matter about how states should fill their judicial vacancies in the first instance—whether by merit selection, unfettered executive appointment, legislative election, contested popular election, or some other process—all undoubtedly would agree that the people of each state hold the raw sovereign power (subject to applicable federal constitutional constraints) to design whatever process they like for choosing new judges.

When the sovereign people of a jurisdiction decide to fill judicial vacancies by a method in which voters themselves are not directly involved (such as by merit-selection or by executive appointment with legislative advice and consent), the people continue to hold the sovereign prerogative to wield any indirect judiciary-shaping power they have retained for themselves. At the federal level, for example, the American people have given the President and the Senate the direct power to fill judicial vacancies,<sup>167</sup> but

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165. See, e.g., U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these Truths to be self-evident, that . . . it is the Right of the People to . . . institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."); THE FEDERALIST NO. 78, *supra* note 119, at 468 ("I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness . . .").

166. See G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 460 (expanded ed. 1988) ("Judges in America can declare and thereby make law. If one takes seriously the notion of law as a set of guidelines for social conduct, American appellate judges have had abundant opportunities to establish those guidelines."); see also *supra* notes 42-50 and accompanying text (discussing the Supreme Court's ruling in *Republican Party of Minnesota v. White*).

167. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .").

citizens routinely—and legitimately—vote for presidential candidates based in part on the kinds of judges that those candidates seem likely to nominate, and they lobby their senators to support or oppose particular nominees. The ABA's Standing Committee on the Federal Judiciary might credibly assure the nation that a given individual is qualified to be a judge<sup>168</sup> (or, in the language of Judge Posner, that a given individual is likely to issue rulings that fall within the zone of reasonableness),<sup>169</sup> but no one would argue that citizens and their elected leaders are obliged to support a potential or actual nominee simply because he or she has been deemed qualified by the legal profession's leaders. Through the politicians they elect, citizens are entitled to choose judges who seem likely to exercise their interpretive discretion in ways that those citizens prefer, and to avoid choosing judges who seem likely to exercise their discretion in ways that are reasonable yet contrary to the electorate's preferences.<sup>170</sup>

The question here is whether the analysis changes when we shift from filling judicial vacancies in the first instance to determining whether a sitting judge—a judge whose interpretive predilections have become a matter of record—ought to be retained. In the privacy of the voting booth, individual citizens hold the raw power to vote against a judge's retention for any reason at all. The matter in dispute is whether voters' commitment to the rule of law deontologically obliges them to refrain from opposing judges who have demonstrated a willingness to rule in ways that are legally permissible but that nevertheless are contrary to

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168. See generally STANDING COMM. ON THE FED. JUDICIARY, AM. BAR ASS'N, WHAT IT IS AND HOW IT WORKS 1 (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/federal\\_judiciary/federal\\_judiciary09.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf) ("In conducting its evaluation of each prospective [judicial] nominee, the Committee focuses strictly on professional qualifications: integrity, professional competence and judicial temperament. The Committee does not take into account a prospective nominee's philosophy, political affiliation or ideology.").

169. See *supra* note 146 and accompanying text (quoting Judge Posner).

170. Cf. Mariah Zeisberg, *Should We Elect the US Supreme Court?*, 7 PERSP. POL. 785, 788 (2009) ("If the people are worthy of making decisions about their constitutive political and legal institutions, we should be suspicious of claims that the people are not capable of judging what kinds of interpretive methodologies would best give effect to the promises of the document they themselves have authorized.").

those voters' own legally permissible preferences. Citing fidelity to the rule of law, proponents of deontological pro-retention arguments urge citizens not to pay any regard to whether a judge standing for retention sometimes issues rulings that occupy a segment of the zone of reasonableness that those citizens do not favor. In light of the fundamental principle that the sovereign people should make no apologies for choosing lawmakers who share their own commitments and values,<sup>171</sup> the burden on proponents of this argument is heavy. Whether that burden can be carried depends squarely upon what fidelity to the rule of law entails.

b. The Rule of Law. As Brian Tamanaha has observed, the phrase "rule of law" is perhaps "*the* preeminent legitimating political ideal in the world today,"<sup>172</sup> but many of those who use it do not "articulate precisely what it means."<sup>173</sup> Moreover, when we *do* turn to the task of fleshing out its meaning, we find that consensus is not easily reached.<sup>174</sup> Laypeople and scholars alike might agree with Thomas Paine's revolutionary assertion that "in free

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171. Cf. Carrington, *supra* note 15, at 107 ("If we are going to use courts to decide whether there is a right to live or a right to die and to set the level of taxation for schools or on cigarettes, then some accountability to the people is required.").

172. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 4 (2004).

173. *Id.* at 3; see also Brian Z. Tamanaha, *The Rule of Law for Everyone?*, in 55 CURRENT LEGAL PROBLEMS 97, 98 (M.D.A. Freeman ed., 2002) (noting that the rule of law is taken for granted as a defining characteristic of democracy). For a discussion of the concept's origins, see Judith N. Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1-5 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (crediting Aristotle and Montesquieu with two different conceptions of the rule of law).

174. See Tamanaha, *supra* note 173, at 101 ("[T]he rule of law is strikingly like the notion of the 'good', in the sense that everyone is for it, but there is no agreement on precisely what it is."); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 159 (2002) ("[T]he lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous . . . . But we disagree on how this can be done, and whether it can ever be done completely.").

countries the law ought to be King,"<sup>175</sup> but they will have different understandings of what it means for the law to be "in charge" in this way.<sup>176</sup> Given this lack of clarity and consensus, it is tempting to conclude that invocations of the rule of law in public discourse are often nothing more than hollow attempts to persuade one's political opponents to surrender<sup>177</sup>—it is tempting to conclude, in other words, that those invocations are often mere "ruling-class chatter"<sup>178</sup> or dressed-up declarations of "Hooray for our side!"<sup>179</sup>

Among those who use it more thoughtfully, the phrase "rule of law" has either substantive or formal meaning. For those who take the substantive view, a legal system adheres to the rule of law only if it protects certain individual rights and thereby achieves the vision of political morality endorsed by the proponents of the substantive conception.<sup>180</sup> If our Judge Jones invokes a substantive understanding of the rule of law as part of her retention campaign, she likely is claiming that the particular rights that were vindicated in her controversial ruling are essential in any society that claims allegiance to the rule of law, and that those who disapprove of her ruling thus fail to understand the rule of law's requirements. If Judge Jones rhetorically deploys the

175. THOMAS PAINE, COMMON SENSE (1776), reprinted in PETER LINEBAUGH PRESENTS THOMAS PAINE: RIGHTS OF MAN AND COMMON SENSE 3, 31 (Jessica Kimpell ed., 2009) (emphasis omitted).

176. Waldron, *supra* note 174, at 157 (stating that there are competing definitions of the "Rule of Law," but that all of those definitions are attempts to define what it would mean for "law [to be] in charge in a society" (emphasis omitted)).

177. Cf. NEUMANN, *supra* note 115, at 23 ("[P]olitically charged concepts like the rule of law are not defined for lexicographic or semantic purposes; they are defined according to an agenda.").

178. Shklar, *supra* note 173, at 1 (noting, but not endorsing, this view); see also *id.* ("It would not be very difficult to show that the phrase "the Rule of Law" has become . . . just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.").

179. Waldron, *supra* note 174, at 139 (noting, but not endorsing, this view).

180. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783 (1989) ("The substantive version holds that the Rule of Law embodies tenets of a particular political morality."); see also *id.* at 783-84 (identifying John Rawls as a proponent of this view). See generally RONALD DWORKIN, A MATTER OF PRINCIPLE 11-18 (1985) (defending a substantive conception of the rule of law).

rule of law in this way, she is using it to defend the controversial ruling itself. As we have seen, however, real-life judges and their defenders rarely make any sustained effort to defend the particular rulings that have sparked voters' anger, choosing instead to build their retention campaigns on the themes of judicial independence, fairness, and impartiality.<sup>181</sup> In those campaigns, one certainly does not typically find attempts to articulate and defend the substantive conception of the rule of law on which this line of argument depends. That is not surprising. Not only do targeted judges and their champions shy away from defending controversial rulings as a general matter, but those who thoughtfully hold the substantive understanding of the rule of law are relatively few in number.<sup>182</sup>

The formal understanding of the rule of law is more prevalent.<sup>183</sup> Under the formal understanding, a society may properly claim fidelity to the rule of law even if its legal regime is substantively quite brutal—a view propounded by Friedrich Hayek,<sup>184</sup> Joseph Raz,<sup>185</sup> and Brian Tamanaha,<sup>186</sup> among many others. Yet substantive concerns about human autonomy and dignity are not shoved wholly to the side. Rather, formalists posit that the rule of law honors human autonomy and dignity by helping to set up the conditions in which individuals are protected from arbitrary exercises of governmental power and can reliably plan their own

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181. See *supra* Part I.A.

182. See Tamanaha, *supra* note 173, at 101 (“[A] few legal theorists[ ] believe that the rule of law . . . necessarily entails protection of individual rights.”).

183. See *id.* (stating that “most legal theorists” subscribe to some version of the formal view).

184. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-73 (1944) (defending a purely formal understanding of the rule of law).

185. See Joseph Raz, *The Rule of Law and Its Virtues*, in *READINGS IN THE PHILOSOPHY OF LAW* 32, 33 (John Arthur & William H. Shaw eds., 5th ed. 2010) (“[T]his conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.”).

186. See, e.g., Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, 3 *HAGUE J. RULE L.* 1, 5-6 (2011) (“The law can be bad, unfair, or harsh, yet still be consistent with the rule of law (think of former racial segregation laws in the USA). An oppressive legal order can satisfy the rule of law . . .”).

futures.<sup>187</sup> Scholars give varying recitations of what those conditions precisely entail, but those recitations commonly echo three interrelated themes.

First, in a society in which the rule of law prevails, no government official (judicial or non-judicial) can hold totally unfettered discretion to adversely affect others' interests when carrying out his or her official duties.<sup>188</sup> As Tom Bingham writes, "[t]he rule of law does not require that official or judicial decision-makers should be deprived of *all* discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary."<sup>189</sup>

Second, the rule of law demands that no one be above the law; citizens and government officials alike must be bound by the law's requirements.<sup>190</sup> If a government official

187. See Raz, *supra* note 185, at 35 ("[T]he rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails . . . respecting [people's] autonomy, their right to control their future."); Tamanaha, *supra* note 173, at 112 ("The primary import of the rule of law . . . in the context of liberalism is . . . that when individuals know the rules in advance they are free to do anything they wish outside of what the rules proscribe.").

188. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188 (10th ed. 1965) ("[Under English law] no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."); TAMANAHA, *supra* note 172, at 122 ("[T]o live under the rule of law is not to be subject to the unpredictable vagaries of other individuals . . ."); James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 595 (2007) ("In its simplest form, the rule of law is little more than proper procedure. In a democracy, rulers are bound to follow established procedures and legal rules, which significantly constrain their discretion."); Tamanaha, *supra* note 173, at 105 ("The core idea of the rule of law, the thread that has run for over two thousand years, . . . is that . . . government officials . . . should operate within a framework of law—that the sovereign is limited by the law.").

189. TOM BINGHAM, THE RULE OF LAW 54 (2010) (emphasis added); see also Burton, *supra* note 143, at 193 ("In principle, judicial discretion can be reconciled with the rule of law when the law constrains the set of reasons upon which judges act lawfully.").

190. See BINGHAM, *supra* note 189, at 8 ("The core of the existing principle is . . . that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made . . ."); DICEY, *supra* note 188, at 193 ("[Under English law] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."); Gibson, *supra* note 188, at 597 ("[T]he rule of law constrains both rulers and the ruled. The rulers must act according to legal procedure, which means they must rule through legislatures



or private citizen wishes to take a course of action that the law does not permit, he or she must refrain from taking that course of action until the law has been changed through established lawmaking procedures.<sup>191</sup>

Third, the rule of law requires that a society's legal regime possess a cluster of additional traits aimed at enabling individuals to take account of the law's requirements when planning their future conduct.<sup>192</sup> As Raz writes, "[t]his is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behavior of its subjects."<sup>193</sup> For this to occur, a

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and courts. The ruled are obliged to follow and acquiesce to these laws."); Massimo La Torre, *'Jurists, Bad Christians': Torture and the Rule of Law*, in *TORTURE: MORAL ABSOLUTES AND AMBIGUITIES* 10, 21 (Bev Clucas et al. eds., 2009) (rejecting the assertion of "exceptional executive powers of the U.S. president as commander in chief of the armed forces, a capacity in which (as the argument goes) the president has free rein and cannot be held accountable under any national or international law"); Raz, *supra* note 185, at 32 ("Taken in its broadest sense [the rule of law] means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.").

191. See TAMANAHA, *supra* note 172, at 114-15 (stating that the rule of law demands that government officials be constrained by the law and that they obey it until it has been changed through legally authorized procedures); Gibson, *supra* note 188, at 597 ("[T]he essential ingredient of the rule of law is *universalism*—the law should be universally heeded. If a law generates an undesirable outcome, it ought to be changed through established procedures; it should not be manipulated or ignored."). Alexander Hamilton echoed this theme in *The Federalist* No. 78:

Until the people have, by some solemn and authoritative act, annulled or changed the established form [of the Constitution], it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.

THE FEDERALIST NO. 78, *supra* note 119, at 468.

192. See HAYEK, *supra* note 184, at 72 ("[T]he Rule of Law . . . means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."); Tamanaha, *supra* note 186, at 4 ("At a minimum, [the rule of law] assumes that legal rules exist and that government officials and citizens know what the rules require in connection with their actions . . .").

193. Raz, *supra* note 185, at 33.

society's laws must be public and intelligible (a person cannot conform her conduct to laws whose contents she cannot locate or understand);<sup>194</sup> conduct-restricting laws must generally be prospective rather than retroactive in application (a person cannot plan his past conduct);<sup>195</sup> laws cannot demand conduct that is impossible to perform (a person cannot plan to do impossible things);<sup>196</sup> and laws must be sufficiently stable to enable an individual to intelligently assess proposed courses of action (a person cannot intelligently choose among alternative actions if she cannot make reasonably reliable predictions about the law's likely response to those actions).<sup>197</sup>

None of those precepts precludes a citizen from voting against a state judge who sometimes represents a portion of the zone of reasonableness that the citizen does not favor. One can be firmly committed to the propositions that judges and other government officials must operate under meaningful constraints, that no one is above the law, and

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194. See LON L. FULLER, *THE MORALITY OF LAW* 49-51, 63-65 (rev. ed. 1969) (discussing the rule of law's insistence that laws be publicly promulgated and reasonably clear); TAMANAHA, *supra* note 172, at 119 (stating that laws must be "public"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."). Raz points out that compliance with the rule of law in this respect is a matter of degree, and that total compliance is impossible—no society's laws can reasonably be purged of all vagueness. Raz, *supra* note 185, at 36. Tamanaha observes that the rule of law is often said to be in decline in the West, as administrative officials acquire increased discretion and as judges increasingly are relied upon to apply broad standards that entail wide-ranging subjective judgments. Tamanaha, *supra* note 173, at 102-03.

195. See FULLER, *supra* note 194, at 51-62 (arguing that laws generally must be prospective in nature, but that there are instances when retroactivity and the rule of law are not in conflict); TAMANAHA, *supra* note 172, at 119 (stating that the rule of law requires "prospective laws"); Raz, *supra* note 185, at 33 (same).

196. See FULLER, *supra* note 194, at 70-79 (elaborating on this theme).

197. See *id.* at 79-81 (arguing that the rule of law demands "constancy" in the law through time); Raz, *supra* note 185, at 33 (making the same point). Of course, the rule of law does not demand that a society's laws be utterly unchanging—what is required is the ability to make reasonably reliable predictions. Cf. NEUMANN, *supra* note 115, at 12 ("Even in a judicially fair system, we must, to plan rationally, assess the moods and fashions of our society to know how broadly the various laws are nowadays interpreted, and how seriously they are taken.").

that individuals must be able to take the law's requirements meaningfully into account when planning their future conduct, and still vote against a judge's bid for retention with the hope that the judge's replacement will favor a different segment of the zone of reasonableness. Pointing to the second of the three rule of law themes,<sup>198</sup> one might suggest that ousting judges is not a legitimate means of securing legal change. Yet this would beg the question of what is and is not legitimate law-shaping behavior in a society committed to the rule of law, and would sit in strong tension with the widely accepted practice of using judicial appointments to move the law in one direction rather than another. Alternatively, pointing to the third theme,<sup>199</sup> one might argue that ousting judges in response to controversial rulings introduces excessive instability into the given jurisdiction's legal regime. Yet ousting a judge does not itself directly bring about any change in the law, and any legal changes that might eventually flow from such ousters are no more destabilizing than the legal changes that elected legislators introduce into legal systems every day.

Thus, there is no deontological conflict between holding a firm commitment to the rule of law and opposing a judge's bid for retention because one would prefer a judge who more frequently occupies a different segment of the zone of reasonableness. The only occasion when one finds a conflict between the rule of law and an anti-retention campaign provoked by a controversial ruling is when the angry voters' own preferred outcome in the controversial case would not itself have fallen within the zone of reasonableness that defines the limits of judges' interpretive discretion.<sup>200</sup> Setting those uncommon instances aside, one must conclude that deontological invocations of the rule of law against anti-retention campaigns usually are just a rhetorical device aimed at "cramp[ing] and compress[ing] the ability of

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198. See *supra* notes 190-91 and accompanying text (discussing the second theme, that no one can be above the law).

199. See *supra* note 197 and accompanying text (discussing the relevant component of the third theme and arguing that constancy in the rule of law allows individuals to take the law into account when planning future conduct).

200. See *supra* Part II.B.2 (discussing the "wayward voter").

individuals to debate and define the conditions of their communal life."<sup>201</sup>

If judges and their defenders hope to find winning arguments when urging voters to retain judges with whom they sometimes disagree, they thus must look to arguments that are consequentialist in nature. It is to the persuasive power of those arguments that I now turn.

### III. THE RHETORICAL WEAKNESSES OF CONSEQUENTIALISM

Pro-retention forces make heavy use of consequentialist arguments, warning that denying retention to judges because they have written or joined controversial rulings poses threats to the integrity of states' judicial systems. They argue that such ousters send other judges the message that they must engage in significant fundraising for their own retention campaigns, and this fundraising then lays the groundwork for actual or perceived conflicts of interest; they argue that such ousters increase the likelihood that judges will decide cases based upon anticipated electoral consequences rather than the thrust of the law; and they warn that such ousters particularly threaten the project of constitutionalism by increasing the likelihood that judges will adjudicate constitutional cases in accordance with likely voters' short-term preferences rather than the sovereign people's long-term constitutional commitments.<sup>202</sup>

Assessed strictly on their merits, arguments aimed at insulating state judges from political accountability are a tough sell. Judicial elections are prevalent in states across the country precisely because the American people have long insisted upon retaining some mechanism for holding state judges electorally accountable for their actions.<sup>203</sup>

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201. Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, *supra* note 173, at 97, 111 (using the quoted language to condemn certain rhetorical uses of the rule of law as antidemocratic).

202. See *supra* Part I.C (describing these consequentialist arguments).

203. See *supra* notes 26-28 and accompanying text (discussing the prevalence of judicial elections); see also *supra* note 24 and accompanying text (stating that twentieth-century opponents of head-to-head judicial elections perceived that merit-selection processes would not be a politically salable means of filling judicial vacancies in the first instance if retention elections were not included somewhere in the mix).

When voters perceive (rightly or wrongly) that state judges have abused their power in some important domain, they are not easily persuaded that judges should remain beyond voters' reach. To the contrary, appeals for political insularity often serve only to underscore the very problem that targeted judges' opponents have diagnosed—namely, that those judges regard themselves as free to disregard the will of the sovereign people.<sup>204</sup>

Opponents of same-sex marriage explicitly made that very point in their successful 2010 campaign against three of the *Varnum* justices in Iowa.<sup>205</sup> In a frequently aired television advertisement, the narrator's opening words cut straight to the issue of accountability: "Some in the ruling class say it is wrong for voters to hold Supreme Court judges accountable for their decisions."<sup>206</sup> After condemning *Varnum* (over images of parents, Boy Scouts, hunters, and flag-saluting schoolchildren), the narrator closed with this exhortation: "To hold activist judges accountable, flip your ballot over and vote no on retention of Supreme Court justices."<sup>207</sup> When voters perceive that judges regard themselves as "ruling class" elites who feel entitled to shape a jurisdiction's moral contours, pro-retention forces are not likely to find much traction with the warning that politicized retention elections will prompt other judges to worry about the electoral consequences of their rulings. At least in some instances, worrying about electoral consequences is precisely what anti-retention forces would like judges to do.

For purposes of the following discussion, however, let us posit that the leading pro-retention consequentialist arguments are fully meritorious—let us assume, in other words, that it is important to spare state judges from having to raise campaign funds and from having to worry about how their rulings will play on Election Day. Wholly apart from their merits, consequentialist arguments of this sort

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204. See Reid, *supra* note 81, at 72 (discussing Justice White's and Justice Lanphier's respective 1996 defeats in Tennessee and Nebraska and the criticisms that they were "out-of-step" with popular opinion); see also *supra* notes 81-92 and accompanying text (discussing those two elections).

205. See *supra* notes 7, 62-69 and accompanying text (discussing that election).

206. Nation for Marriage, *supra* note 63.

207. *Id.*

are rhetorically hobbled by the fact that they are indeed consequentialist in nature.

A. *Sacred Values, Taboo Trade-offs, and the Aversion to Consequentialism*

Most anti-retention campaigns are fueled by morally outraged voters' belief that sacred values are at stake—values that, by their very nature, resist consequentialist pleas for compromise. Targeted judges' consequentialist arguments also threaten to alienate voters from some of their core commitments. These arguments suffer the effects of discounting, and they have difficulty gaining a foothold in settings where voters rely upon like-minded cultural authorities to help them sort through competing empirical claims. Finally, even if consequentialist arguments can overcome all of those daunting obstacles, they contain an inherent tension that threatens to strip them of any remaining rhetorical force.

1. *Sacred Values and Their Concomitants.* In a pluralistic society like the United States, citizens with conflicting values and commitments frequently must negotiate their differences by making whatever compromises and trade-offs are necessary in order to produce mutually satisfactory public policies.<sup>208</sup> There are areas, however, in which individuals hold what psychologists, sociologists, and others call “sacred” or “protected” values—values that “a moral community implicitly or explicitly treats as possessing infinite or transcendental significance that precludes comparisons, trade-offs, or indeed any other mingling with bounded or secular values.”<sup>209</sup> Because sacred values are absolutist in

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208. Cf. A. Peter McGraw & Philip E. Tetlock, *Taboo Trade-Offs, Relational Framing, and the Acceptability of Exchanges*, 15 J. CONSUMER PSYCHOL. 2, 2 (2005) (“Many theories of judgment and choice rest on the premise that people make judgments and decisions as intuitive economists . . . who are prepared to confront uncertainty, trade-offs, and opportunity costs to make the best decisions in competitive markets.”).

209. Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 853 (2000) [hereinafter Tetlock, *The Psychology of the Unthinkable*]; see also Jonathan Baron & Mark Spranca, *Protected Values*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 3 (1997) (“We call the

nature, they are strongly correlated with deontological modes of reasoning<sup>210</sup>: making decisions that implicate these values is less about assessing the consequences of a proposed course of action and more about manifesting the kind of person that one understands oneself to be.<sup>211</sup> Some sacred values are religious in origin, while others are not. A person may hold sacred values concerning racial equality, for example, or concerning a woman's ability to control her own reproductive capacities.<sup>212</sup> Whatever their origin, the hallmark of sacred values is their holders' perception that those values are non-fungible and thus should not be traded off against non-sacred values.<sup>213</sup> The holder of sacred values

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values in question 'protected' to emphasize the fact that their defining property is the reluctance of their holders to trade them off with other values."); Philip E. Tetlock, *Thinking the Unthinkable: Sacred Values and Taboo Cognitions*, 7 TRENDS IN COGNITIVE SCI. 320, 320 (2003) ("[P]eople often insist with apparently great conviction that certain commitments and relationships are sacred and that even to contemplate trade-offs with the secular values of money or convenience is anathema.").

210. See Baron & Spranca, *supra* note 209, at 3 (stating that protected values express their holders' commitment to deontological rules, such that those individuals feel that they must engage in certain kinds of behavior no matter what the consequences); Carmen Tanner et al., *Influence of Deontological Versus Consequentialist Orientations on Act Choices and Framing Effects: When Principles are More Important than Consequences*, 38 EUR. J. SOC. PSYCHOL. 757, 764-66 (2008) (noting the association between protected values and deontology); Carmen Tanner & Douglas L. Medin, *Protected Values: No Omission Bias and No Framing Effects*, 11 PSYCHONOMIC BULL. & REV. 185, 185 (2004) ("[Protected values] are believed to arise from deontological principles, rather than from consequentialist assessments of gains and losses.").

211. McGraw & Tetlock, *supra* note 208, at 2; cf. MAX WEBER, *The Vocation of Politics*, in THE ESSENTIAL WEBER: A READER 257, 261-62 (Sam Whimster ed., 2004) (distinguishing between an "ethic of conviction," which pays no regard to consequences, and an "ethic of responsibility," which takes account of the consequences of one's actions).

212. See Morgan Marietta, *From My Cold, Dead Hands: Democratic Consequences of Sacred Rhetoric*, 70 J. POL. 767, 768 (2008) ("Modern sacredness has come to comprise both the religious and secular sacred, grounded in pluralistic sources of authority that establish for different individuals and groups the limits of the tolerable and negotiable, the boundaries of the sacred.").

213. See Baron & Spranca, *supra* note 209, at 4 ("The defining property of protected values is *absoluteness*"); Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 256 (1997) (stating that sacred values entail "moral limits to fungibility").

might not carry the principle of absoluteness to its extreme by shunning consequentialist reasoning entirely, but when presented with an option that threatens those values, he or she is likely to be powerfully disposed to regard that option as morally troubling regardless of the consequences that might flow from rejecting it.<sup>214</sup>

One frequently finds such values expressed in culturally divisive areas of public policy.<sup>215</sup> The National Rifle Association's slogan "from my cold, dead hands," for example, makes an absolutist claim about gun ownership and disclaims any possibility of compromise.<sup>216</sup> Some opponents of same-sex marriage uncompromisingly condemn government leaders "who would try to redefine God's institution and say that marriage is anything other than one man and one woman."<sup>217</sup> Some citizens insist that abortion is murder and that the practice should be banned

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214. See Tanner et al., *supra* note 210, at 764-66 (reporting the authors' empirical finding of a strong correlation between protected values and a deontological decision-making orientation, but noting that holders of protected values do not entirely foreclose entertaining consequentialist arguments); see also Rumen Iliev et al., *Attending to Moral Values*, in MORAL JUDGMENT AND DECISION MAKING 169, 188 (Daniel M. Bartels et al. eds., 2009) (concluding that the holders of sacred values are not always rigidly insensitive to consequences). If the proposed violation of a sacred value is small and the benefits secured by the violation are great, for example, holders of sacred values show an increased willingness to compromise the sacred value. See Jonathan Baron & Sarah Leshner, *How Serious Are Expressions of Protected Values?*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 183, 192-93 (2000) (summarizing the results of the authors' empirical research, including the finding that holders of protected values will accept actions that violate the values when the harm is small compared to the benefit); see also Ilana Ritov & Jonathan Baron, *Protected Values and Omission Bias*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 79, 81 (1999) (stating that if the consequences of fully honoring a sacred value are sufficiently onerous, the holder of the value may be willing to compromise by weighing the sacred value against the undesirability of the threatened consequences).

215. See Marietta, *supra* note 212, at 768 (describing the invocation of sacred values in areas such as abortion, gay marriage, gun rights, the death penalty, and environmentalism).

216. See *id.* at 770-71 (citing this example).

217. Jason Hancock, *Chuck Hurley: Ousting Iowa Supreme Court Justices Was 'God's Will,'* IOWA INDEP. (Nov. 3, 2010), <http://iowaindependent.com/46996/chuck-hurley-ousting-iowa-supreme-court-justices-was-gods-will> (quoting Chuck Hurley, president of the conservative Iowa Family Policy Center).



even in cases of rape and incest,<sup>218</sup> while others insist that the government is never entitled to restrict a woman's ability to terminate her own pregnancy.<sup>219</sup> Some argue that the death penalty amounts to state-sanctioned murder that can never be justified,<sup>220</sup> while others argue that there are instances in which execution is the only morally acceptable punishment.<sup>221</sup> In these and other areas, many citizens profess that they are committed to their core values no matter what the circumstances or the costs.

For those who hold a set of values as sacred, there thus is a powerful moral aversion to "taboo trade-offs"—trade-offs that entail compromising one's commitment to sacred values in order to accommodate other, less exalted values.<sup>222</sup> Even taking time to *consider* a taboo trade-off can render a decision-maker morally suspect: "[T]he longer observers believe that decision makers contemplated compromising sacred values, even if they ultimately do the right thing and support sacred values, the more intense the outrage they

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218. See, e.g., *Should Abortion Be Allowed?*, GODVOTER.ORG, <http://www.godvoter.org/abortion-should-be-allowed.html> (last visited Nov. 12, 2011) (making these arguments).

219. See, e.g., *Bans on Abortion After 12 Weeks*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/what-is-choice/abortion/abortion-bans.html> (last visited Nov. 12, 2011) ("The decision whether to have an abortion should be made by a woman, with her doctor and her loved ones. Politicians should play no part in this decision.").

220. See, e.g., *Abolish the Death Penalty*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty> (last visited Nov. 12, 2011) ("The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state.").

221. See, e.g., *Home*, PRO-DEATH PENALTY.COM, <http://www.prodeathpenalty.com/> (last visited Nov. 12, 2011) ("Why do we hear so much about the killers and so little about the victims and their loved ones who are left behind to pick up the pieces?").

222. See McGraw & Tetlock, *supra* note 208, at 4 ("[Taboo trade-offs] entail comparisons of the relative importance of secular values (e.g., money, time, and convenience) with sacred values that are supposed to be infinitely significant."); Tetlock, *The Psychology of the Unthinkable*, *supra* note 209, at 854 ("[R]igidity, accompanied by righteous indignation and by blanket refusal even to contemplate certain thoughts, can be commendable—indeed, it is essential for resolutely reasserting the identification of self with the collective moral order." (citation omitted)).

direct at those decision makers.”<sup>223</sup> If a parent contemplates prostituting one of her children for rent money, for example, she almost assuredly will perceive that her mere contemplation of the transaction constitutes a serious moral transgression, even if she ultimately rejects the possibility. One who wrestles with a taboo trade-off (rather than rejecting it outright) may subsequently feel the need to engage in conduct that provides “moral cleansing”—conduct that reaffirms one’s commitment to sacred values and thereby restores one’s identity and place within the community.<sup>224</sup> After all (one tells oneself), decision-making options that entail compromising sacred values are supposed to be easy to reject; surely it is a sign of a moral failing if rejecting those options consumes significant cognitive energy.<sup>225</sup> The moral aversion to taboo trade-offs is so powerful that merely witnessing another person contemplate or advocate such a trade-off can cause one to feel a need for dissociative moral purification.<sup>226</sup>

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223. Tetlock, *The Psychology of the Unthinkable*, *supra* note 209, at 855; see also Fiske & Tetlock, *supra* note 213, at 256 (“People reject certain comparisons because they feel that seriously considering the relevant trade-offs would undercut their self-images and social identities as moral beings.”).

224. Tetlock, *The Psychology of the Unthinkable*, *supra* note 209, at 855.

225. See Sarah Lichtenstein et al., *What’s Bad Is Easy: Taboo Values, Affect, and Cognition*, 2 JUDGMENT & DECISION MAKING 169, 184 (2007) (“If it’s bad enough to be taboo, then it’s easy to know what to do, and help with thinking carefully is not likely to be accepted when a proposal is so clearly wrong.”). Indeed, the ease with which some decisions involving sacred values can be made may be part of sacred values’ appeal. See Marietta, *supra* note 212, at 771 (“Psychologists argue that humans have a propensity to be ‘cognitive misers,’ expending only the minimum amount of mental energy sufficient to the task at hand. . . . In this sense, absolutist reasoning may be more efficient.” (citation omitted)). Empirical research indicates that decision-makers do indeed find decisions easy to make when those decisions pit a sacred value against non-sacred values. See Martin Hanselmann & Carmen Tanner, *Taboos and Conflicts in Decision Making: Sacred Values, Decision Difficulty, and Emotions*, 3 JUDGMENT & DECISION MAKING 51, 58-60 (2008) (summarizing the results of the authors’ empirical research and finding that people tend not to trade off their sacred values for other values). By the same token, decision-makers find that the most difficult decisions to make are those that demand “tragic trade-offs”—decisions that pit a sacred value against another sacred value, such that the decision-maker cannot fully honor both of the values. See *id.*

226. See McGraw & Tetlock, *supra* note 208, at 4.

Political leaders frequently invoke sacred values, encouraging citizens to remain faithful to their core moral commitments, no matter what the consequences.<sup>227</sup> Invoking sacred values in this way can bring politicians at least two significant benefits. First, it can create a “valorization effect,” whereby voters perceive those politicians as leaders who are “more principled, virtuous, and determined than others,” thereby increasing their appeal on Election Day.<sup>228</sup> Second, sacred rhetoric can increase voter turnout by stirring citizens’ emotions, by communicating to voters that their moral and cultural identities are at stake, and by offering citizens an opportunity to use their ballots as a way “to morally cleanse any disquieting or disreputable affiliation with a sacred violation.”<sup>229</sup>

Appeals to sacred values are especially prominent in politically conservative circles. In a study of all presidential debates between 1976 and 2004, for example, political scientist Morgan Marietta found that Democrats tended to focus on the complexity of public policy and on competing claims about consequences, while Republicans were more likely to make absolutist claims grounded in sacred values.<sup>230</sup> “Democrats are publicly committed to doing what is best,” Marietta concluded, “while Republicans are publicly committed to doing what is right.”<sup>231</sup> Observing that same phenomenon, Donald Braman and Dan Kahan note that liberals often “disclaim reliance on contested versions of the good life and instead base arguments on grounds acceptable to citizens of diverse moral outlooks.”<sup>232</sup> Liberals tend to embrace consequentialist modes of argument, Braman and Kahan write, “[b]ecause [consequentialist

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227. See Marietta, *supra* note 212, at 768 (arguing that sacred rhetoric discourages consequentialist modes of reasoning in favor of absolutist modes of reasoning).

228. Morgan Marietta, *The Absolutist Advantage: Sacred Rhetoric in Contemporary Presidential Debate*, 26 POL. COMM. 388, 388 (2009); see also *id.* at 393-94 (citing empirical support for the valorization effect).

229. Marietta, *supra* note 212, at 772; see also *id.* at 769-71 (discussing this concept further).

230. Marietta, *supra* note 228, at 394-98.

231. *Id.* at 406.

232. Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 583 (2006).

arguments] elide contestable judgments of value, . . . [they] are the ‘don’t ask, don’t tell’ solution to cultural disputes in the law . . . .”<sup>233</sup>

*2. The Implications for Judicial Retention Elections.*

Values held as sacred within politically conservative circles are plainly playing a powerful role in the new wave of highly politicized judicial retention elections. In 2010, for example, opposition to abortion was the driving force in Alaska and Kansas,<sup>234</sup> opposition to same-sex marriage was the driving force in Iowa,<sup>235</sup> and opposition to favorable treatment of violent felons was (at least ostensibly) one of the driving forces in Illinois.<sup>236</sup> In Florida, the focal point was the Florida Supreme Court’s refusal to allow citizens to vote on a proposed constitutional amendment that would have barred the state from requiring individuals to buy health insurance—a requirement that violates some people’s deeply held values of autonomy.<sup>237</sup> In 1986, the primary issue in California was the targeted justices’ perceived determination to spare convicted murderers from execution.<sup>238</sup> In 1996, the issue in Tennessee was a ruling

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233. *Id.* Braman and Kahan argue that when moderates avoid debates about core values and focus instead on consequentialist arguments, they cede the stage to “cultural zealots” who then further entrench in their battles against one another. *Id.* at 571.

234. *See supra* note 9 and accompanying text (noting the Alaska election); *supra* note 13 and accompanying text (noting the Kansas election).

235. *See supra* note 7 and accompanying text (describing the Iowa election).

236. The campaign against Chief Justice Kilbride originated with concerns about tort damages, but anti-retention forces built their public campaign against him on issues relating to criminal defendants, perceiving that they thereby had a better shot at persuading voters. *See supra* note 12 and accompanying text (describing the Illinois election).

237. *See, e.g.*, 155 CONG. REC. S13,730 (daily ed. Dec. 22, 2009) (statement of Sen. Jon Kyl) (arguing that requiring individuals to purchase health insurance is “a stunning assault on liberty”); *see also supra* note 11 and accompanying text (noting the 2010 Florida election). Although it is less obvious, values relating to autonomy may also have been in play in Colorado, where one of the primary focal points was the Colorado Supreme Court’s role in increasing citizens’ tax burdens. *See supra* note 10 and accompanying text (describing the Colorado election).

238. *See supra* notes 76-80 and accompanying text (describing the California election).

favorable to a convicted murderer and rapist.<sup>239</sup> In Nebraska that same year, one of the central issues was a series of rulings that made it more difficult to convict individuals of second-degree murder.<sup>240</sup> In each of these instances, the targeted judges had issued rulings that some voters found morally outrageous.

Pro-retention forces' consequentialist arguments might effectively persuade voters who come to the table in a neutral frame of mind, but they are poorly designed to persuade morally outraged voters to set aside their anger about judges' controversial rulings on Election Day. Rather than directly engage judges' opponents in a debate about the values they deem sacred, proponents of consequentialist arguments ask those angry voters to do two things that many of them find morally objectionable: to ignore the taboo trade-offs that they believe the targeted judges made in their controversial rulings, and to make a taboo trade-off of their own by voting to allow the unrepentant moral transgressors to remain on the bench because ousting them could lead to other forms of improper judicial behavior down the road.<sup>241</sup> What targeted judges' consequentialist arguments ask voters to do, in other words, is compromise sacred values that, by their very nature, purport to be absolute and non-fungible.

In the eyes of many conservative voters, for example, the justices who struck down Iowa's ban on same-sex marriage made a morally outrageous trade-off, compromising sacred values relating to marriage and sexuality in order to accommodate values relating to equality for gays and lesbians.<sup>242</sup> For those voters, organizations like Fair Courts for Us then compounded the moral offense when they asked voters to tolerate the justices' actions lest a culture of vigorous anti-retention

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239. See *supra* notes 82-87 and accompanying text (describing the Tennessee election).

240. See *supra* notes 88-92 and accompanying text (describing the Nebraska election).

241. See *supra* notes 222-26 and accompanying text (discussing taboo trade-offs).

242. See *supra* notes 7, 62-69 and accompanying text (discussing *Varnum*).

campaigns tempt judges to behave inappropriately.<sup>243</sup> Even taking time to *consider* those kinds of consequentialist arguments would have been perceived by many Iowa voters as morally problematic, insofar as such contemplation would manifest at least a theoretical willingness to compromise their sacred commitments.<sup>244</sup> This kind of rigid, insistently deontological thinking emerged immediately after the *Varnum* decision came down: when Republican United States Senator Charles Grassley said that he wanted to take a little time just to *think* about whether Iowans should amend their constitution to ban same-sex marriage, some conservative leaders excoriated him for not being sufficiently opposed to what those leaders regarded as a morally abhorrent practice.<sup>245</sup>

In addition to deterring the consequentialist modes of thinking that judges and their defenders promote, sacred values also help to mobilize the holders of those values. Values-driven anti-retention campaigns should rarely have difficulty finding leaders, for example, in part because they offer individuals the opportunity to further their own political careers by securing the benefits of the valorization effect.<sup>246</sup> In Iowa, a failed gubernatorial candidate eagerly led the charge against the three Iowa justices,<sup>247</sup> while Republican presidential hopefuls used the anti-retention campaign as an opportunity to try to improve their standing among social conservatives.<sup>248</sup> The invocation of sacred values also increases the likelihood that those values' holders will turn out on Election Day.<sup>249</sup> In part, that is

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243. See *supra* note 67 and accompanying text (discussing Fair Courts for Us' campaign to voters to retain the judges).

244. See *supra* notes 223-25 and accompanying text (discussing moral opposition to merely considering a taboo trade-off).

245. See Jason Hancock, *Salier: Grassley Could Be Primaried*, IOWA INDEP. (Apr. 10, 2009), <http://iowaindependent.com/13888/salier-grassley-could-be-primaried> (reporting the remarks of Bill Salier, a leading Iowa conservative).

246. See *supra* note 228 and accompanying text (noting the valorization effect).

247. See Pettys, *supra* note 7, at 724-29 (discussing the leadership of Bob Vander Plaats, who had just been defeated in the Iowa gubernatorial primary).

248. See *id.* at 736 (quoting remarks made by Mike Huckabee, a 2008 presidential hopeful, and Newt Gingrich, a 2012 presidential hopeful).

249. See *supra* note 229 and accompanying text (noting that citizens are more likely to vote when they perceive that their sacred values are in play).

because voting against the targeted judges' retention provides an opportunity both to condemn those judges for their perceived moral transgressions, and to cleanse oneself from any contamination that one might feel as a result of one's association with the moral transgressors or as a result of merely witnessing the moral transgressions themselves.<sup>250</sup>

*B. Alienation, Discounts, and Empirical Uncertainty*

Suppose pro-retention forces manage to surmount those obstacles and persuade morally outraged voters that— notwithstanding their sacred commitments—they ought to think seriously about the consequences of ousting judges in response to their controversial rulings. When the conversation does turn to consequences, targeted judges and their defenders will encounter additional hurdles.

1. *Alienation and Perceptions of Fairness.* The same sacred values that deter their holders from deploying consequentialist modes of reasoning will continue to loom large if those angry voters weigh the perceived benefits of ousting controversial judges against the threatened consequences of such ousters. After all, sacred values do not lose their moral pull merely because a voter reluctantly agrees to consider trading those values off against other social goods. Pro-retention forces might thus try to counteract angry voters' moral outrage with a moral argument of their own, namely: all litigants are morally entitled to fair and impartial courts; ousting judges in response to controversial rulings will make it less likely that litigants will have the benefit of fair and impartial courts in the future; it thus is morally wrong to oust judges in response to controversial rulings.<sup>251</sup> But for voters who come to the table already morally outraged by a targeted judge's actions, this proposed line of consequentialist moral reasoning is problematic. As a number of philosophers have pointed out, it is hard to embrace a consequentialist moral argument when doing so requires one to alienate oneself

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250. See *supra* note 224 and accompanying text (describing the dynamics of moral cleansing).

251. See *supra* Part I.C (describing comparable arguments).

from one's deontological convictions and commitments.<sup>252</sup> As David McNaughton and Piers Rawling concisely observe, "[i]f morality cuts us off from some important part of ourselves then it appears unattractive" and is difficult to accept.<sup>253</sup>

Alienation of this sort is a problem for pro-retention consequentialist arguments that ask voters to compromise some of their core moral convictions. The threat of such alienation provides morally outraged voters with a powerful incentive to find some means by which to rationalize dismissing or downplaying the consequentialist threats that judges and their defenders describe. One should not underestimate those powers of rationalization.

Consider, for example, values relating to procedural fairness—widely held values that lie at the heart of judges' consequentialist arguments. Empirical research has yielded two insights that are important for our purposes here. First, when a decision-making process yields an outcome that a person regards as morally outrageous, she is more likely to regard that process as procedurally unfair than when it yields a result that she finds morally acceptable.<sup>254</sup> A person

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252. See, e.g., Dean Cocking & Justin Oakley, *Indirect Consequentialism, Friendship, and the Problem of Alienation*, 106 ETHICS 86, 111 (1995) ("[Consequentialists have] attempt[ed] to overcome the problem of alienation which many have thought besets consequentialism in its direct forms . . . ."); Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, in CONSEQUENTIALISM AND ITS CRITICS 93, 93 (Samuel Scheffler ed., 1988) (observing that a moral regime may be "self-defeating" if it "bring[s] with it alienation—from one's personal commitments, from one's feelings or sentiments, from other people, or even from morality itself"); see also *id.* at 125-26 (stating that for a moral regime to be appealing, its proponents must show that it would "not alienate us from the particular commitments that make life worthwhile"); Scott Woodcock, *When Will Your Consequentialist Friend Abandon You for the Greater Good?*, 4 J. ETHICS & SOC. PHIL., no. 2, Feb. 2010, at 1, 3-4 (noting that a number of philosophers have wrestled with the apparent tension between the deontological bonds of friendship and certain consequentialist modes of moral argument); cf. Michael Stocker, *The Schizophrenia of Modern Ethical Theories*, 73 J. PHIL. 453, 453 (1976) ("Modern ethical theories . . . fail to examine motives and the motivational structures and constraints of ethical life.").

253. David McNaughton & Piers Rawling, *Deontology and Value*, in PHILOSOPHY, THE GOOD, THE TRUE, AND THE BEAUTIFUL 197, 197 (Anthony O'Hear ed., 2000).

254. Linda J. Skitka, *Do the Means Always Justify the Ends, or Do the Ends Sometimes Justify the Means? A Value Protection Model of Justice Reasoning*, 28



might believe that a court's decision-making procedures are fair as a general matter, for example, but her appraisal of the court's procedures is likely to be degraded if the court issues what she regards as a morally objectionable ruling.<sup>255</sup> Second, when strong moral convictions are in play, people sometimes reduce their commitment to procedural fairness when doing so makes those moral convictions easier to vindicate.<sup>256</sup> In more than one study, "American citizens appeared to be more concerned that government and legal authorities arrived at [those citizens'] morally mandated outcome[s] than whether the government and legal authorities dignified and respected the involved parties' rights to due process."<sup>257</sup>

All of this spells trouble for the argument that retaining controversial judges is necessary in order to preserve the fairness of a state's judicial proceedings.<sup>258</sup> When a state court issues a ruling that a voter finds morally objectionable, the voter is likely to reduce his or her appraisal of the fairness of that court's decision-making procedures. A consequentialist plea to preserve the status quo with respect to fairness is thus not received in the way that its proponents intend—for many morally indignant voters, the courts *already* are adjudicating cases unfairly, and so the status quo is something that ought to be changed (by removing the offending judges) rather than preserved. Similarly, when pro-retention forces argue that ousting judges in response to controversial rulings might lead to unfair adjudications in the future, angry voters are not as likely as they might otherwise be to assign those fairness concerns great weight. Rather, those voters are likely to

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PERSONALITY & SOC. PSYCHOL. BULL. 588, 594 (2002); *see also id.* ("[F]air procedures do not ameliorate the sense of injustice people experience when [what they regard as] a morally mandated outcome is threatened or rejected.").

255. *See id.* (summarizing the results of a study concerning values involving civil rights for homosexuals, access to abortion, and public services for illegal immigrants).

256. *See* Linda J. Skitka & Elizabeth Mullen, *The Dark Side of Moral Conviction*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 35, 38 (2002) ("Having a moral mandate has . . . been associated with a disregard for procedural protections and due process.").

257. *Id.* at 39.

258. *See supra* Part I.C (describing the widespread claim that anti-retention campaigns are a threat to the fairness and impartiality of states' courts).

lessen their commitment to fairness if that commitment would stand as an obstacle to vindicating the important moral values that they believe the targeted judges violated in their controversial rulings. In these ways, angry voters can rationalize their rejection of the consequentialist arguments that judges and their defenders advance, and can thereby fend off the sense of alienation that would flow from compromising some of their core deontological commitments.

2. *Discounting the Future.* Nearly a century and a half ago, economist and philosopher William Stanley Jevons observed that “a future feeling is always less influential than a present one.”<sup>259</sup> Human beings’ seemingly hard-wired tendency to discount the future when making intertemporal choices<sup>260</sup> poses yet another set of obstacles for pro-retention forces’ consequentialist arguments.

To a certain degree, assigning future feelings and events less weight than present ones is a perfectly sensible thing for decision-makers to do. After all, one intuitively recognizes that one’s predictions about the future nearly always carry a measure of uncertainty, and it is appropriate to discount the weight that one assigns to those predictions accordingly.<sup>261</sup> When confronted with the risk that a given choice will cause one to suffer unpleasant consequences, for example, one must assess the odds that the threatened consequences will indeed materialize, one must predict the magnitude of the losses that those consequences will inflict, and one must judge the likelihood that one will indeed perceive those consequences as losses when they actually

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259. W. STANLEY JEVONS, *THE THEORY OF POLITICAL ECONOMY* 72 (5th ed. 1957) (1871).

260. An intertemporal choice is a choice “involving trade-offs among costs and benefits occurring at different times.” Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, in *TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE* 13, 13 (George Loewenstein et al. eds., 2003).

261. See GEORGE AINSLIE, *PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON* 81 (1992) (“[T]here has [long] been a stubborn belief that it is irrational to discount for delay beyond an allowance for uncertainty . . . .”); JEVONS, *supra* note 259, at 72 (“To secure a maximum of benefit in life, all future events, all future pleasures or pains, should act upon us with the same force as if they were present, *allowance being made for their uncertainty.*” (emphasis added)).

occur.<sup>262</sup> To the extent one is not certain about those matters, it is rational to proportionately discount the weight of the threatened consequences when weighing the pros and cons of one's decision-making options.

In many instances, however, rational discounting for uncertainty is just the beginning. We have a well-documented, seemingly innate tendency to go even further, discounting the future far beyond what rationally accounting for uncertainty would require.<sup>263</sup> As psychiatrist George Ainslie has explained, "living mostly for the present moment is our natural mode of functioning."<sup>264</sup> Numerous studies demonstrate that individuals often have a strong preference for present-day rewards over delayed rewards of greater quality or value.<sup>265</sup> People thus often make "time-inconsistent choices"—choices that bring a certain measure of satisfaction in the short term but that are inconsistent with those decision-makers' greater long-term interests.<sup>266</sup> Time inconsistency thus leads to problems for the actor who fails to behave in a manner that accurately anticipates his or her own future needs and preferences.<sup>267</sup> It also leads to

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262. Cf. KENNETH R. MACCRIMMON & DONALD A. WEHRUNG, *TAKING RISKS: THE MANAGEMENT OF UNCERTAINTY* 10 (1986) ("[T]here are three components of risk—the *magnitude of loss*, the *chance of loss*, and the *exposure to loss*. To reduce riskiness, it is necessary to reduce at least one of these components.").

263. See AINSLIE, *supra* note 261, at 95 ("There is good evidence that all organisms have an innate tendency to discount delayed rewards roughly in proportion to that delay . . ."); JEVONS, *supra* note 259, at 72 (stating that we should not discount the future beyond taking into account uncertainty, but that no one's mind is constituted in this "perfect way"); R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 165, 177 (1956) (stating that it appears that most people are born with "discount functions" that cause them to overvalue more "proximate satisfactions" compared to more distant ones). For a sophisticated yet accessible introduction to the literature, see Philip Streich & Jack S. Levy, *Time Horizons, Discounting, and Intertemporal Choice*, 51 J. CONFLICT RESOL. 199, 199-214 (2007).

264. AINSLIE, *supra* note 261, at 57.

265. See *id.* at 58-60 (summarizing several such studies); see also *id.* at 95 (stating that people often prefer "poorer, earlier goals over objectively better goals that are more delayed").

266. See Stephen J. Hoch & George F. Loewenstein, *Time-Inconsistent Preferences and Consumer Self-Control*, 17 J. CONSUMER RES. 492, 493 (1991) (discussing time inconsistency in the consumer context).

267. See Shane Frederick, *Time Preference and Personal Identity*, in TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL

difficulties for others who will be adversely affected by the actor's behavior.<sup>268</sup> In the area of climate change, for example, some scholars charge members of the present generation with unethical short-sightedness, arguing that they are improperly discounting the needs and preferences of future generations far beyond what a discount for mere uncertainty would warrant.<sup>269</sup>

When leaders of the bar and others warn angry voters that their anti-retention campaigns threaten to compromise state courts' efforts to adjudicate cases fairly and impartially, those voters are thus likely to discount that claim. Voters quite rationally will apply a modest discount for uncertainty—it is theoretically possible, after all, that most judges will stand firm in the face of anti-retention campaigns, refusing to engage in significant fundraising and resisting the temptation to worry about the electoral consequences of their rulings, and it is possible that if judges do take greater heed of the electorate's preferences in the future, today's angry voters will regard those rulings as praiseworthy. Even beyond those discounts for uncertainty, morally outraged voters may assign greater weight to the moral vindication they would like to experience today than to the negative consequences they and others will suffer in

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CHOICE, *supra* note 260, at 89, 89 (“[S]omeone who chooses a smaller amount of utility now over a greater amount in some future period is clearly *not* maximizing utility over that interval.”). Discussing the work of philosophers, Frederick entertains the possibility that “a person is nothing more than a succession of overlapping selves related to varying degrees by physical continuities, memories, and similarities of character and interests,” such that “discounting one’s ‘own’ future utility may be no more irrational than discounting the utility of someone else.” *Id.* at 90.

268. Cf. John Broome, *Discounting the Future*, 23 PHIL. & PUB. AFF. 128, 131 (1994) (“I shall generally take for granted the majority view [among philosophers] that the pure discount rate should be zero: future well-being ought not to be discounted.”); F.P. Ramsey, *A Mathematical Theory of Saving*, 38 ECON. J. 543, 543 (1928) (“[To] discount later enjoyments in comparison with earlier ones [is] a practice which is ethically indefensible . . .”).

269. See, e.g., NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE* 51 (2007) (“[T]he only sound ethical basis for placing less value on the utility . . . of future generations [is] the uncertainty over whether or not the world will exist, or whether those generations will all be present.”); see also *id.* at 35 (“It is, of course, possible that people actually do place less value on the welfare of future generations, simply on the grounds that they are more distant in time. But it is hard to see any ethical justification for this.”).

the future, even if—viewed from a perspective free of time inconsistency—those negative consequences clearly outweigh the benefits of today's moral vindication. The emotions and preferences that one anticipates holding down the road often simply cannot compete with the emotions and preferences that one already holds in the present moment.

3. *Confronting Empirical Uncertainty.* Yet another set of obstacles for consequentialist arguments concerns the difficulties citizens face when confronted with empirical uncertainty. Public-policy debates frequently feature competing empirical claims about consequences. Some assert that capital punishment deters violent crime, for example, while others assert that it does not. Some claim that tight restrictions on gun possession lead to fewer deaths and injuries, while others claim that tight restrictions make it easier for violent criminals to prey upon innocent civilians. The vast majority of citizens cannot make first-hand judgments about the accuracy of such assertions, because they have not conducted their own empirical studies. To decide which claims to accept and which to reject, therefore, citizens often will deploy two strategies. First, they frequently will credit those empirical assertions that confirm their present beliefs, while ignoring or discrediting those that do not.<sup>270</sup> Second, for help in navigating the field of competing claims, citizens often turn to authorities whom they trust—and the authorities whom they trust ordinarily will be those who appear to share their own values. Dan Kahan and Donald Braman explain:

[W]hat individuals accept as truth cannot be divorced from the cultural commitments that define their identities. Our knowledge of all manner of facts—that men landed on the moon in 1969; . . . that the paternity of a baby can be determined from a DNA test—derives not from first-hand observation but from what we are told

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270. See Braman & Kahan, *supra* note 232, at 579-80 (making this point with respect to the debate about gun control); see also *id.* at 584-85 ("While predictably failing to change anyone's mind, empirical analyses *do* reinforce the conviction of those who already accept their conclusions that a rational and just assessment of the facts *must* support their position."); Dan M. Kahan & Donald Braman, Essay, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006) ("Based on a variety of overlapping psychological mechanisms, individuals accept or reject empirical claims about the consequences of controversial policies based on their vision of a good society.").

by those whose authority we trust. Whom we regard as worthy of such trust . . . is governed by norms that we have been socialized to accept. For this reason, factual disagreement can be ripe with political and cultural conflict. If you insist that I am wrong to believe that the Holocaust took place, or that God created the world, you obviously aren't reporting that your sensory experience differs from mine; you are telling me that you *reject* the authority of institutions and persons I am morally impelled to defer to.<sup>271</sup>

American political discourse thus frequently features warring cultural authorities on controversial issues. Relying heavily upon their respective favored news outlets, those authorities endlessly castigate one another with little expectation of changing their opponents' minds and with a fierce determination not to cede their opponents any measure of victory.<sup>272</sup>

A split among cultural authorities is now plainly emerging with respect to the politicization of judicial retention elections. Judges and bar leaders urge citizens never to oust judges merely for issuing controversial rulings; they warn that such ousters would undercut state courts' ability to provide fair and impartial forums for litigation.<sup>273</sup> The leaders of anti-retention campaigns dismiss such warnings as elitist, anti-democratic rhetoric; they advise citizens that ousting objectionable judges is one way in which the sovereign people can take the reins of government back into their own hands.<sup>274</sup> We thus have a sharp disagreement about the effects of anti-retention campaigns: will they disastrously undercut courts' ability to provide the fair and impartial adjudicative forums on which the sovereign people depend, or will they free the sovereign

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271. Braman & Kahan, *supra* note 232, at 584; *see also* Kahan & Braman, *supra* note 270, at 151 (stating that, when presented with empirical claims that they cannot evaluate first-hand, people "have to take the word of those whom they trust on issues of what sorts of empirical claims, and what sorts of data supporting such claims, are credible," and that the authorities whom "people . . . trust, naturally, are the ones who share their values").

272. *See* Marietta, *supra* note 212, at 768 (stating that when political debate is infused with rhetoric about sacred values, it often does not feature leaders trying to strike a reasonable compromise; rather, it features cultural authorities pitched against one another in an endless battle).

273. *See supra* Part I.C.

274. *See supra* notes 7-13 and accompanying text.

people from the control of elitist judges who do not understand their proper role in our democratic society?

That debate is not susceptible to decisive resolution through laypeople's first-hand observations—citizens cannot peer into the future and definitively see what the consequences of sustained anti-retention activity will be, nor are the effects of past anti-retention campaigns discoverable without the aid of empirical research. There thus is little to prevent citizens from taking refuge in whichever set of arguments best suits their preferences at a given moment in time—those who supported same-sex marriage in Iowa could fall in line behind leaders of the bar, for example, while those who opposed it could fall in line behind social conservatism's political and religious leaders. Moreover, faced with empirical uncertainty regarding the long-term effects of anti-retention campaigns, many citizens will seek guidance from cultural authorities who share their core values. On issues like abortion, same-sex marriage, and the death penalty, social conservatives will rely upon prominent champions of socially conservative causes, while more liberal-minded citizens will rely upon authorities who have traditionally placed great stock in judicial review and in courts' ability to help shield unpopular groups and individuals from the reach of hostile political majorities. With the two camps thus deeply dug in, consequentialist arguments lobbed from one set of trenches to the other will have little persuasive effect.

### C. *An Inherent Tension*

Finally, a self-defeating tension inheres in the consequentialist arguments on which judges targeted for non-retention commonly rely. Those consequentialist arguments posit that judges who are shielded from political forces decide cases based upon the law rather than upon reasons that they self-interestedly supply, but that some of those same judges are likely to deviate from the law in an effort to keep their jobs if they believe they will be exposed to energetic political scrutiny on Election Day.<sup>275</sup> That line of argument presumes that, for the typical judge, there is a sharp categorical difference in the kinds of self-interested temptations to which she is susceptible: she can reliably

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275. See *supra* Part I.C.

resist the temptation to decide cases based on her own personal preferences (even preferences that are shaped by sacred values to which she is deontologically committed),<sup>276</sup> but she cannot reliably resist the temptation to decide cases based upon her desire to win voters' approval and thereby avoid losing her seat on the bench (even though, if ousted, she likely could return to the practice of law<sup>277</sup> or pursue some other occupation befitting her professional talents and reputation).

It is naïve to suppose that morally indignant voters will uncritically accept that categorical description of judges' powers of self-restraint. Some of them are far more likely to perceive that pro-retention forces' consequentialist arguments carry within them a critical confession—namely, that when judges perceive that their self-interests are sufficiently at risk, they are willing to ignore what they believe to be the thrust of the law and to decide cases based upon reasons that they (rather than the law) supply. But if that confession is true, then the contention that angry voters should spare judges from political scrutiny is largely stripped of any remaining rhetorical power that it might otherwise carry. If judges are indeed susceptible to the temptation to decide cases for legally inappropriate reasons, and if citizens perceive that their options are either (1) to allow judges to do what they wish without fear of political retribution, or (2) to subject judges' rulings to periodic electoral inspection, there can be little doubt which of those options many angry voters will choose.

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For all of these reasons, the odds of persuading morally outraged voters to support a targeted judge's bid for retention are extraordinarily low. Pro-retention forces' consequentialist arguments might find traction with voters who are otherwise inclined to sit on the sidelines, but those arguments will have great difficulty finding a foothold with voters who are morally indignant about a targeted judge's rulings. As activists bring greater attention to judicial retention elections, therefore, state judges' ability to remain on the bench will depend less upon the merits of the

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276. See *supra* Part III.A.1 (discussing sacred values).

277. One of my colleagues quips that "sending a judge back to practice is like sending a cop to prison."



consequentialist arguments that judges and their defenders have long advanced, and more upon whether those judges have written or joined rulings that deeply offend the moral sensibilities of a significant number of voters. Regardless of their analytic merits, consequentialist arguments about judicial independence and the need for fair and impartial courts simply lack the rhetorical power necessary to reach voters who are convinced that an unrepentant judge has committed a grave moral transgression.

### CONCLUSION

When retention-seeking judges confront opposition from morally indignant voters, those judges and their defenders typically attempt to deflect voters' attention from the rulings that have sparked voters' anger, and focus instead on what has become a familiar set of deontological and consequentialist arguments.<sup>278</sup> Those arguments are aimed at persuading voters that it is inappropriate and unwise to oust judges merely because one disagrees with some of their rulings.<sup>279</sup> Upon closer inspection, however, those arguments are largely ineffectual. The deontological arguments are usually untrue,<sup>280</sup> and the consequentialist arguments lack the rhetorical power necessary to convince outraged voters that they ought to set their anger aside on Election Day.<sup>281</sup>

If we are persuaded by the consequentialist claim that the rise in organized anti-retention activity threatens to inflict lasting damage on the integrity of states' judicial systems, what are we to do? There are numerous options, but they are not all equally saleable in the political arena. States could move toward a system of life tenure for their appointed state judges, for example, so that—like their federal counterparts<sup>282</sup>—those judges would remain wholly beyond the reach of angry voters. Or states could appoint judges to a specified term of years but then provide for legislative or gubernatorial reappointments, so that voter

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278. See *supra* Part I.A.

279. See *supra* Parts I.B, I.C.

280. See *supra* Part II.

281. See *supra* Part III.

282. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

sentiment about judges' rulings could be filtered through citizens' elected representatives. In most states, however, such proposals would be political non-starters. In nearly every state in the country, citizens have long insisted upon maintaining some form of direct electoral control over judges' ability to remain in office.<sup>283</sup>

Acknowledging those political realities, at least two options merit the attention of lawmakers, judges, and other leaders, although space constraints permit doing little more than describing them here. First, states could abandon judicial retention elections altogether, but limit appointed judges to single terms of relatively short duration. In 2003, the ABA Commission on the 21st Century Judiciary comparably proposed abandoning judicial elections, finding that the problems associated with judicial elections of all kinds are simply too numerous and too intrinsic to overcome.<sup>284</sup> If sitting judges did not have to worry about winning voters' approval in order to keep their jobs, they would have no need for campaign fundraising, nor would they have any direct electoral incentive to decide cases based upon voters' apparent short-term preferences rather than upon the perceived thrust of the law.<sup>285</sup> Sitting judges could behave, in other words, in precisely the ways that proponents of merit-selection systems originally intended.<sup>286</sup>

Any proposal to eliminate judicial retention elections will surely encounter the same opposition that proponents of merit-selection systems encountered nearly a century ago, when they urged states to abandon elections as a

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283. See *supra* notes 26-28 (describing states' judicial-selection systems).

284. JUSTICE IN JEOPARDY, *supra* note 108, at 70-73; cf. Republican Party of Minn. v. White (*White I*), 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

285. See Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 458 (2008) ("If a judge cannot be appointed or elected to succeed himself, then the greatest pressure to conform judicial decisions to the popular will is lessened."). Of course, judges might still worry about electoral ramifications if they have ambitions for political leadership down the road, but at some point one must resign oneself to the fact that not every conceivable threat can be removed from the process of choosing one's judges.

286. See *supra* notes 21-25 and accompanying text (recounting the objectives underlying the merit-selection system).

means of filling judicial vacancies in the first instance.<sup>287</sup> To make the elimination of retention elections politically saleable today, states likely would need to reduce the length of appointed judges' terms. If those terms were sufficiently short, voters could be assured that if they were unhappy with a given judge's performance, they would not have to wait very long before he or she was replaced. Of course, judges' terms could not be so short that talented candidates would be disinclined to step away from their current professional endeavors for an opportunity to serve their state on the bench. We thus would need to strike the same balance that former Ohio Supreme Court Justice Frederick Grimke tried to strike more than a century and a half ago, when he wrote, "I would . . . make the tenure of the judges long enough to induce lawyers of competent ability to abandon the profession in exchange for that office; while at the same time, I would not make it so long as to absolve the judges from a strict responsibility to the community."<sup>288</sup> When Grimke balanced those two competing objectives, he concluded that judges' terms should range somewhere between five and ten years.<sup>289</sup> The citizens of each state would have to reach a compromise on where, precisely, that line ought to be drawn.

Of course, taking this approach would carry significant costs: some good judicial candidates might remain unwilling to serve if the position did not come with the potential for a career-spanning time horizon, and states would lose the services of seasoned, respected judges when those judges completed their designated terms. Suppose we ultimately made the judgment that it thus would be unwise to limit all appointed state judges to single terms of relatively short duration. What then?

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287. See *supra* notes 21-25 and accompanying text (recounting this history). Merit-selection's advocates reluctantly added retention elections to their proposed reform packages only because they made the political judgment that they needed to "have an answer for detractors who oppose[d] plans that 'take away our right to vote.'" Geyh, *supra* note 96, at 55.

288. FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 457 (John William Ward ed., 1968) (1848); see also Carrington, *supra* note 15, at 118 (citing Grimke for this point and stating that Grimke "thought about these issues as deeply as anyone in antebellum times").

289. GRIMKE, *supra* note 288, at 456.

As a second alternative, judges and their champions could set aside their historic reluctance to engage citizens in debates about the merits of controversial cases,<sup>290</sup> and could urge angry voters to reexamine their conclusions about those cases' legal and moral underpinnings. Rather than ignore the value commitments that drive voter dissatisfaction, pro-retention forces could confront those value commitments head-on, engaging citizens in a conversation about values and their proper place in the law. If the targeted judges themselves remained reluctant to engage in those discussions—fearing, for example, that they would create confusion if their remarks were construed as adding a new gloss to their written opinions, or that their comments might be taken as an unethical promise to decide future cases in a particular way<sup>291</sup>—then judges' supporters could carry that burden for them.

There is, admittedly, deep skepticism in some quarters about laypeople's ability to engage in intelligent deliberations about sophisticated legal matters. Calling it one of the "dirty little secrets of contemporary jurisprudence," Roberto Unger observes that many in the United States (and in other western nations, too) are deeply uncomfortable with democracy.<sup>292</sup> This discomfort manifests itself in many ways, Unger writes, including the "ceaseless identification of restraints upon majority rule," the heavy reliance upon courts to bring about desirable public policy changes, and the urge to reduce public discourse about governmental matters to discussions resembling "a polite conversation among gentlemen in an eighteenth-century drawing room."<sup>293</sup> Larry Kramer makes the same point, observing that many are inclined to limit the field of lawmakers and law interpreters to "a trained elite of judges

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290. See *supra* Part I.A (discussing this aversion).

291. See *supra* notes 58-61 and accompanying text (acknowledging such concerns).

292. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72 (1996); accord LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 243 (2004) ("[S]kepticism about people and about democracy is a pervasive feature of contemporary intellectual culture.").

293. UNGER, *supra* note 292, at 72-73.

and lawyers,” leaving ordinary citizens to sit mostly on the sidelines.<sup>294</sup>

A growing number of scholars have taken issue with that mindset in recent years, arguing (among other things) that it insults the rational capacities of rights-bearing people.<sup>295</sup> My own view is that these scholars have it exactly right, and that pro-retention forces thus should engage morally indignant voters in a spirited civil discourse about values and about the merits of controversial rulings. As Donald Braman and Dan Kahan have argued, political moderates need to “come out from behind the cover of consequentialism and talk through their competing visions of the good life without embarrassment.”<sup>296</sup> In its 2002 ruling in *Republican Party of Minnesota v. White*,<sup>297</sup> the Supreme Court observed that there was an “obvious tension” between using elections to fill judicial vacancies<sup>298</sup> and trying to prevent judicial “candidates from discussing what the elections are about.”<sup>299</sup> By the same token, there is significant tension between giving voters the power to cast

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294. KRAMER, *supra* note 292, at 7-8.

295. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 14 (1999) (“[I]t simply will not do for theorists of rights to talk about us as upright and responsible autonomous individuals when they are characterizing our need for protection against majorities, while describing the members of the majorities against whose tyranny such protection is necessary as irresponsible Hobbesian predators.”); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 345-58 (2008) (identifying five reasons to believe that the American people are capable of distinguishing between their long-term constitutional commitments and their short-term political desires); see also *id.* at 316 (citing work by Larry Kramer, Sanford Levinson, Mark Tushnet, Adrian Vermuele, and Jeremy Waldron, all arguing that the task of determining the Constitution’s meaning ultimately rests with the sovereign people). See generally Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, in *THE RULE OF LAW*, *supra* note 143, at 148, 161 (“The ultimate conformity of our institutions with the norms of legality and the limits of permissible discretion depends on a populace capable of supporting a tolerable balance of rules and discretion, and of making judgments in particular cases . . .”).

296. Braman & Kahan, *supra* note 232, at 586; see also *supra* notes 232-33 and accompanying text (discussing Braman and Kahan’s arguments).

297. 536 U.S. 765 (2002).

298. *Id.* at 787.

299. *Id.* at 788; see also *supra* notes 42-50 (discussing this and other aspects of *Republican Party of Minnesota v. White*).

ballots in judicial retention elections and insisting that it is inappropriate or pointless to engage citizens in a conversation about rulings that a significant number of voters find problematic. If we do not believe voters are up to the task of making judgments about judges' performance, then we are foolish to maintain a system in which voters are asked to decide whether judges should remain in office. Conversely, if we embrace a system in which voters have the power to decide judges' fate on Election Day, then we should not presume that citizens are incapable of engaging in constructive civil discourse about judges' rulings. We cannot have it both ways.

